85-78

Office-Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS
CLERK

No. 84-

IN THE
Supreme Court of the United States

October Term, 1984

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN C. GORSUCH
ATTORNEY GENERAL

KENNETH C. POWERS*
ASSISTANT ATTORNEY GENERAL

State of Alaska
Department of Law
Office of the Attorney General
1031 West 4th Ave., Suite 200
Anchorage, Alaska 99501
(907) 276-3550

* *Counsel of Record* *Counsel for Petitioner*

aBCD Legal Printers, Seattle, Washington

QUESTIONS PRESENTED

I.

Is the use of a lake in Alaska by floatplanes relevant to the issue of title navigability? Standing alone, is the uncontroverted use of Slopbucket Lake as a base for floatplane operations sufficient to establish title navigability?

II.

Was it an abuse of discretion to rule that floatplane use in Alaska is legally irrelevant to the issue of title navigability without providing the State of Alaska an opportunity to present its case at trial?

PARTIES INVOLVED

Petitioner is the sovereign State of Alaska, admitted to the Union on January 3, 1959.

Respondents are the United States of America; Donald Hodel, Secretary of the Interior; Robert Burford, Alaska State Director, Bureau of Land Management; Bristol Bay Native Corporation; and Iliamna Natives Limited. Respondents were appellees below and defendants in the district court.

Respondent Iliamna Natives Limited, by stipulation, did not participate in the proceedings below or in the district court but agreed to be bound by the result. Counsel for Iliamna Natives Limited has informed the State of Alaska that it will not participate actively in the proceedings before this Court but that it has an interest in the outcome.

TABLE OF CONTENTS

Page

Questions Presented i

Parties Involved ii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statement of the Case 2

1. District Court Decision 4

2. Court Of Appeals Decision 6

Reasons for Granting the Writ 8

1. The Decision Below Is Inconsistent With Prior Rulings Of This Court And The Fundamental Principles Of Title Navigability 8

2. The Importance Of The Decision Below Warrants Review 10

3. Exercise Of This Court's Supervisory Responsibilities Over The Lower Federal Courts Is Appropriate In This Case 13

Conclusion 15

Page

Appendices:

Appendix A (Opinion of the Court of Appeals) A-1

Appendix B (Amendment to Opinion of the Court of Appeals) B-1

Appendix C (Memorandum and Order of the District Court) C-1

Appendix D (Judgment of the District Court) D-1

TABLE OF AUTHORITIES

Cases

	Page
Arenas v. United States, 322 U.S. 419 (1944)	13
Barney v. Keokuk, 94 U.S. 324 (1876)	11
Economy Light and Power Co. v. United States, 256 U.S. 113 (1921)	12,13
Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)	10
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	11
Kennedy v. Silas Mason Co., 334 U.S. 249 (1948)	13
Montana v. United States, 450 U.S. 544 (1981)	2
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)	11
Puget Sound Power & Light Co. v. FERC, 644 F.2d 779 (9th Cir. 1981)	12
Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 133 N.E. 371 (N.Y. 1921)	7
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871)	9,12-13
The Montello, 87 U.S. (20 Wall.) 430 (1874)	9,13
The Propellor Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851)	9-10
United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940)	5,9
United States v. Holt State Bank, 270 U.S. 49 (1926)	5,9,12
United States v. Utah, 283 U.S. 64 (1931)	11,13
Utah v. United States, 403 U.S. 9 (1971)	9

Statutes

28 U.S.C. § 1254(1)	2
Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628	4

Regulations

43 C.F.R. § 2650.0-5(o)	4

No. 84-

IN THE
Supreme Court of the United States

October Term, 1984

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, the State of Alaska, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 28, 1985.

OPINIONS BELOW

The opinion of the court of appeals is reported at 754 F.2d 851, and is set forth in Appendix A, *infra*, pp. A-1 - A-8. An unpublished amendment to that opinion is set forth in Appendix B, *infra*, p. B-1. The memorandum and order of the United States District Court for the District of Alaska is reported at 563 F. Supp. 1223, and is set forth in Appendix C. *infra*, pp. C-1 - C-9.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. On May 22, 1985 Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including June 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the federal test of title navigability and the State of Alaska's constitutional right to be admitted into the Union on an equal footing with all other states with respect to sovereign rights and powers. The case has significant ramifications for public land ownership and public use of waterbodies for purposes of transportation and commerce, particularly for access to public lands and remote areas in Alaska. If the lower court decision is not reversed, ownership of the beds of public waterbodies throughout Alaska may be placed in private hands, with the serious potential for long term restrictions on, or loss of, public control and access.

Under long-standing precedents of this Court, state ownership of the beds of navigable waters, in trust for the people of the state, is an inherent attribute of sovereignty protected under the equal footing doctrine. *Montana v. United States* , 450 U.S. 544, 551 (1981). The federal test of title navigability was established by this Court to identify those rivers and lakes which are properly classified as "navigable." At issue in this case is application of that test to one of the customary uses of rivers and lakes in Alaska—use for transportation conducted by floatplanes.

The State of Alaska brought this action to quiet title to the bed of Slopbucket Lake, a small lake in southwestern Alaska which serves as an important base for floatplane operations. Despite its diminutive size, the convenient location and natural physical characteristics of Slopbucket

Lake have combined to make it an integral part of an extensive inter- and intraregional transportation system that brings passengers, goods and mail both into and out of Alaska's "bush." Excerpt of Record in the Court of Appeals (E.R.) 171. In support of the title claim, the State of Alaska sought a declaratory judgment that this important public use of Slopbucket Lake for transportation purposes establishes navigability and, accordingly, that title to the bed of the lake vested in the State of Alaska at the time of statehood.

The significance of this case extends far beyond the shores of Slopbucket Lake. When Alaska entered the Union on January 3, 1959, floatplanes were and long had been a customary mode of water-based transportation in the state. The use of floatplanes in Alaska began in the 1920's and was already well-established by the end of that decade. Long before Alaska's statehood, floatplanes were a common mode of conducting transportation on rivers and lakes throughout the territory. The use of floatplanes was a major factor in the settlement and economic development of the state and was essential to Alaska's ability to achieve statehood. E.R. 107-110.

Today, the rivers and lakes used by floatplanes remain vital arteries in Alaska's transportation network. Due to Alaska's geography, immense distances, limited stage of development, and harsh climatic conditions, there are still very few overland highways in Alaska. Perhaps more than in any other state, Alaska's "highways" are the rivers and lakes upon which floatplanes and various types of boats can operate. In the vast undeveloped expanses of Alaska, these rivers and lakes continue to be the primary, and sometimes the sole, routes of travel. People, goods, equipment, natural resources, and the United States mail are transported all across the state by floatplanes using these natural highways. As Alaska develops and the population increases, the continued availability of Alaska's rivers and lakes for transportation in this traditional mode is becoming increasingly vital, not only

to the citizens of the State of Alaska but to people from around the world who travel to and seek to explore America's "last frontier." E.R. 80-82.

The federal government recognizes the importance of the use of Alaska's waterbodies for transportation conducted by floatplanes. In determining whether and where public easements should be reserved for access to and use of important public waterbodies, or "major waterways" as the federal government now calls them in Alaska, extensive use by floatplanes is considered compelling evidence. By regulation, a river or lake is considered a "major waterway" if it has "significant use in its liquid state by watercraft for access to publicly owned lands or between communities." 43 C.F.R. § 2650.0-5(o). In a classic example of "Newspeak,"[1] the federal respondents determined Slopbucket Lake to be a "major waterway" under that regulatory definition but nonnavigable under the conceptually similar but even broader definition of title navigability established by this Court. E.R. 205. Based upon the administrative policy decision to disregard floatplane use in making title navigability determinations, the federal respondents sought to convey fee simple title to the bed of Slopbucket Lake to respondents Bristol Bay Native Corporation and Iliamna Natives Limited, pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628. The State of Alaska, as sovereign trustee of the public's right to use and have access to Slopbucket Lake, and other lakes in Alaska which are important natural elements of Alaska's transportation system because of their use by floatplanes, initiated this action to challenge the federal government's exclusionary policy.

1. District Court Decision

In the United States District Court for the District of Alaska, the State of Alaska moved for summary judgment

[1] A term for government double-talk coined by author George Orwell in the novel *1984*.

on the basis of substantial, uncontroverted evidence that floatplanes are a customary mode of conducting transportation on water in Alaska, that Slopbucket Lake is used extensively for conducting transportation in this customary mode, and the unambiguous ruling of this Court that navigability does not depend upon the mode by which transportation is conducted, so long as customary in the state at the time of statehood. *United States v. Holt State Bank*, 270 U.S. 49,56 (1926).

On May 12, 1983 the district court issued a memorandum and order denying the State of Alaska's motion for summary judgment and granting the federal government's motion for partial summary judgment. The court ruled that use of a lake for transportation conducted by floatplanes is legally irrelevant to title navigability determinations. Appendix C, *infra*.

To arrive at that decision, the district court either ignored or paid mere lip service to this Court's legal precedents. Although title navigability is an issue of fact, the district court held no factual hearing and entered no factual findings. The district court acknowledged the principle that each application of the federal test of navigability is "apt to uncover variations and refinements which require further elaboration," *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940), but simply ignored the companion principle that the test of navigability is designed to embrace, not exclude, factual variations in modes of use which exist across the United States. *Id.*

The district court ruled that the State of Alaska might well have been able to persuade the trier of fact that floatplanes constitute a customary mode of conducting commerce in Alaska. The district court also conceded that floatplanes operate upon the water. The court found, however, that "absurd results would no doubt occur in the present case if floatplane use were deemed legally relevant in determining

navigability for title." 563 F. Supp. at 1227 n. 5; Appendix C, *infra*, p. C-6 n. 5. Without any factual basis for the underlying assumptions, the district court reasoned that "there are over three million lakes in Alaska and a great number of them are accessible by floatplane. A ruling in favor of the State would severely complicate the land selection scheme in Alaska which Congress set forth in the Alaska Statehood Act and ANCSA." *Id.*

The district court's decision was based entirely upon land management concerns both irrelevant to the factual issue of title navigability and in direct conflict with the constitutional principle that the State of Alaska has primary management responsibility for the rivers and lakes which serve as natural components of Alaska's transportation infrastructure. Without the benefit of either briefing or a hearing on its novel approach to title navigability, the district court simply disregarded the uncontested facts submitted by the state in support of summary judgment and ruled as a matter of law that floatplanes are not a mode of conducting commerce on water, at least for the purpose of determining navigability for title. Based upon that exclusionary legal ruling and the state's subsequent waiver of all title navigability claims independent of the activities of floatplanes, the district court dismissed the state's complaint with prejudice and entered final judgment in favor of all defendants. Appendix D, *infra*.

2. Court Of Appeals Decision

On appeal, the Ninth Circuit affirmed. The court of appeals correctly recognized that navigability is a flexible concept and that, under this Court's guiding precedents, the phrase "customary modes of trade and travel on water" must be liberally construed, taking into account transportation methods in use at the time of statehood. 754 F.2d at 854; Appendix A, *infra*, pp. A-5 - A-6. *Without citation of authority*, however, the court of appeals also declared that navigability necessarily involves utilization of the waterway

as a path between two points and therefore that only transportation methods that carry goods from point to point on the water are evidence of navigability.

Applying these newborn principles to the case before it, the court of appeals assumed as a fact that floatplanes do not travel on water. The district court, however, had made no such factual finding. To the contrary, the district court had refused to even consider, for misguided policy reasons, the evidence which was or could have been submitted by the State of Alaska establishing that floatplanes do travel on the water, sometimes for considerable distances. *See, e.g.*, E.R. 102.

The court of appeals' decision also failed to address compelling legal precedents brought to its attention. Over sixty years ago, nearly forty years before Alaska's statehood, Justice Cardozo had ruled that floatplanes are, in fact, a mode of water transportation:

> The latest of man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. . . .
>
> We think the craft, though new, is subject, while afloat, to the tribunals of the sea. . . Any structure used, or capable of being used, for transportation upon water, is a vessel. All that remains is to ascertain the uses and capacities of the structure to be classified. . . A hydro-aeroplane, while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation.

Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 133 N.E. 371, 371-72 (N.Y. 1921) (Cardozo, J.).

After considering the relevant facts and appropriate legal precedents, Justice Cardozo specifically rejected the same simplistic and incorrect analysis adopted by the lower courts in this case:

> It is true. . . that the function of movement in the water is auxiliary and secondary. . . . [but that] is no reason for

> the exclusion of jurisdiction. . . . [T]here must always, for at least some space, be movement upon the water before there is assent into the air. Jurisdiction cannot vary as the distance is short or longer.

Id. at 371. Despite the compelling logic of Justice Cardozo's opinion, the decision below did not even attempt to distinguish it, nor address the facts and policies which strongly suggest its applicability here.

REASONS FOR GRANTING THE WRIT

The decision below departs from the undisputed hallmark of this Court's jurisprudence on the federal test of title navigability: that navigability is a question of fact. The court's decision is unprecedented; it is inconsistent with prior decisions of this Court; it is inconsistent with the fundamental principles underlying the constitutional doctrine of title navigability; and it denies the State of Alaska equal footing. Compounding these errors, the court of appeals issued its novel and broadly sweeping legal ruling without providing the State of Alaska an opportunity to challenge the factual assumptions upon which the decision was based. The significance of these errors, together with the importance of the sovereign rights at issue and the immediate and potential effect of the decision, merit the exercise of this Court's certiorari jurisdiction.

1. The Decision Below Is Inconsistent With Prior Rulings Of This Court And The Fundamental Principles Of Title Navigability

For the first time in the history of title navigability litigation, the court of appeals in this case ruled that actual public use of a waterbody for purposes of transportation and commerce, conducted in a mode which was customary in the state on the date of statehood, may legally be disregarded. That decision cannot be reconciled with the quintessential

principle that navigability in the United States is an issue of fact, not an inflexible legal standard. *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1871). It is the waterbody's capacity for public transportation and commerce that determines navigability, not the manner or extent of that use. *The Montello*, 87 U.S. (20 Wall.) 430,441-42 (1874). Navigability does not depend on the particular mode of use but rather on the fact, if it be a fact, that the waterbody affords a natural channel for conducting useful commerce. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

Over one hundred years ago, this Court accurately predicted:

> Vessels of any kind that can float upon the water . . . are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining . . . navigability.

The Montello, 87 U.S. (20 Wall.) at 442. That is exactly what has occurred in this case. Under this Court's controlling decisions, the extensive use of Slopbucket Lake for transportation conducted by floatplanes cannot be ignored simply because the mode of use is new. In apparent recognition of that legal reality, the court of appeals rested its exclusionary ruling instead on an unprecedented definition of the term "highway." By semantic sleight of hand, the court of appeals simply transformed the conceptual term "highway" into a limitation on the mode of public use necessary to establish title navigability.

This Court has consistently considered and rejected attempts to restrict the federal test of navigability by application of restrictive legal definitions of its terms. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971) (rejecting proposed interpretation of phrase "highway of commerce"); *United States v. Appalachian Power Co.*, 311 U.S. 377, 405-06 (1940) (rejecting proposed interpretation of phrase "natural and ordinary condition"); *The Propellor Genessee Chief v.*

Fitzhugh, 53 U.S. (12 How.) 443, 455-57 (1851) (rejecting attempt to substitute the *description* of public, navigable water *for the object intended to be described*). The court of appeals' departure from the well-established precedents of this Court deserves this Court's attention.

2. The Importance Of The Decision Below Warrants Review

The overall, long-term effect of the decision below cannot be precisely quantified. However, based as it is upon a precedent-setting legal interpretation, rather than a limited factual determination, its effect unquestionably extends far beyond the particular facts of this case.

The decision is certainly of tremendous importance in Alaska, and not only because public ownership of the bed of Slopbucket Lake hinges on the outcome. In vast areas of Alaska, the rivers and lakes upon which floatplanes operate are the primary if not the sole routes of travel. Public ownership of the beds of those rivers and lakes is a constitutionally guaranteed aspect of state sovereignty designed to assure, in perpetuity, the continued availability of those rivers and lakes for use by the people of the state and the nation. According to this Court:

> [T]itle necessarily carries with it control over the waters above them, whenever the lands are subjected to use. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties.

Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

Without considering the particular facts of floatplane use on Slopbucket Lake, the court of appeals issued a sweeping legal ruling that totally excludes consideration of the activities of floatplanes from any title navigability case in Alaska,

regardless of the facts, and even though the use of floatplanes on other rivers and lakes in Alaska may and does occur in a variety of different factual settings.

The decision below, if not reversed, will permit the federal government to transfer title to the bed of Slopbucket Lake, and potentially many other rivers and lakes which serve as components of Alaska's transportation system, into private ownership. The critical importance and potentially disastrous consequences of such a decision have been unequivocally stated by this Court:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers.

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845).

Although the full effect of transfer into private ownership of currently public waterways in Alaska cannot be foretold with complete accuracy, this Court has held that government regulation of privately-owned submerged land, even though the waters are properly subject to government control, is nevertheless subject to the constitutional prohibition on taking without just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979). State regulation of private property is also subject to social and political pressures which do not attend state regulation of state land. The federal test of title navigability was established by this Court to avoid these and other potential limitations on state control over public waterways. *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876). Because the title of the state depends upon the outcome, future possibilities cannot be ignored. *Cf. United States v. Utah*, 283 U.S. 64, 83 (1931).

Moreover, the effect of the legal limitation on title navigability findings invented by the court below may not be limited to Alaska. Although the extensive use of floatplanes may be unique to Alaska (the only other state to have entered the Union since the invention of floatplanes is Hawaii), the decision below could nevertheless have significant impacts elsewhere. The court of appeals ruled that the term "highway" in the test of title navigability requires that the transportation be conducted from point to point on the body of water. That legal ruling could be applied to limit title navigability decisions throughout the United States, where rivers and lakes often serve as only one portion of the route of travel. Logs in the Pacific Northwest begin their journey on land, travel a short but critical distance downstream, and complete their journey travelling overland. *See Puget Sound Power & Light Co. v. FERC*, 644 F.2d 779 (9th Cir. 1981). Similarly, small lakes in Minnesota and Wisconsin have long been recognized as navigable under the federal test even though the trips establishing navigability seldom begin and end on the shores of one lake. *See, e.g., United States v. Holt State Bank*, 270 U.S. 49 (1926) (Mud Lake in Minnesota); *Economy Light and Power Co. v. United States*, 256 U.S. 113, 117 (1921) (series of lakes, rivers and overland portages, in combination, established useful travel route).

The respondent federal defendants and Alaska Native corporations do not question the potentially significant scope of the decision in this case. To the contrary, in both the district court and the court of appeals, respondents repeatedly asserted that this case involves a significant issue potentially affecting title to millions of acres of submerged land throughout Alaska and the United States. *See, e.g.*, E.R. 210, 317-18, 429, 490, 505.[2] The district court and court of appeals

[2] The State of Alaska contested both the respondents' acreage estimates and respondents' theory that a finding of navigability for Slopbucket Lake would necessarily require a finding of navigability for every other body of water on which a floatplane theoretically could land. Under this Court's precedents, navigability is a question of fact. *The Daniel Ball* 77 U.S. at

court of appeals also recognized the importance of this case, stating in their opinions that they were breaking important new ground on an issue with potentially significant impacts on land ownership, land management and on the law of title navigability. The importance and significance of the issue presented, acknowledged by all parties (albeit for different and generally conflicting reasons), by the district court and the court of appeals, warrants review by this Court.

3. Exercise Of This Court's Supervisory Responsibilities Over The Lower Federal Courts Is Appropriate In This Case

The extent of Alaska's constitutional right to the beds of navigable waters, potentially affecting sovereign authority over rivers and lakes throughout Alaska, should not have been decided without providing the state with a full and fair opportunity to present evidence on all the facts which did or could have influenced either the deliberations or the outcome.

It is the settled jurisprudence of this Court that summary disposition is inappropriate where the legal issues are of particular significance, or novel, and can best be resolved only upon a fully developed record. *Arenas v. United States*, 322 U.S. 419, 431-32, 434 (1944); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948). The State of Alaska's sovereign claim

---

563. Each navigability case must therefore be decided on its own facts. *United States v. Utah*, 283 U.S at 87 (1931). Canoes have been recognized as evidence of navigability, *Economy Light & Power Co. v. United States*, 256 U.S. at 117, yet not every creek with enough water to float a canoe must be found navigable. *The Montello*, 87 U.S. (20 Wall.) at 442. Had the lower courts correctly issued a finding of navigability or nonnavigability based upon the particular facts of this case, that decision would not automatically have determined the navigability of any other waterbody in Alaska. The ruling that evidence of floatplane use legally is irrelevant to title navigability determinations, however, has foreclosed an important factual inquiry into the actual use of every waterbody in Alaska. Thus, the significance and effects of the decision in this case have been substantially increased by the manner of disposition below.

of navigability based upon floatplane use clearly constitutes such a case. Both lower courts acknowledged the significance of this case and the novelty of the issue. A complete understanding of the nature, extent, and importance of floatplane use in Alaska is essential to a well-reasoned decision in a case with the potential for significant, irreversible effects on public ownership and control over rivers and lakes throughout Alaska which are used for floatplane transportation. Indeed, both lower courts relied upon a variety of factual assumptions about the nature of floatplane use in order to reach their legal conclusions. The State of Alaska disputes those factual assumptions, yet it was never provided an opportunity to create a complete factual record.

In the district court, the State of Alaska moved for summary judgment based upon a wealth of undisputed information regarding the use of floatplanes on Slopbucket Lake and on the use and importance of floatplanes in Alaska. The district court ignored these factual materials and ruled as a matter of law that floatplane use is legally irrelevant to the navigability question. The court of appeals, perhaps recognizing the district court's erroneous legal analysis, *assumed* as a fact that floatplanes do not operate on the water and, based on that incorrect and unsupported fact, affirmed the district court's dismissal of Alaska's claims.

All the factual materials submitted to the district court revealed that floatplanes are used, *on the water,* in a wide variety of factual situations in Alaska. E.R. 80, 96, 102, 109, 422. Substantial evidence regarding floatplane use on Slopbucket Lake was also introduced. E.R. 145-182. Had the State of Alaska been given the opportunity to do so, however, the state could have and would have introduced substantial additional evidence demonstrating, for example, that lodge owners on Slopbucket Lake use their floatplanes to travel across the lake, make a short, airborne "portage" across the sand beach separating Slopbucket Lake from Lake Iliamna,

and continue on Lake Iliamna to the local trading post. The trip is made both to haul the lodge owners' supplies and, for a fee, to haul supplies to others.

If the uncontroverted evidence regarding floatplane use submitted by the State of Alaska in support of summary judgment was not conclusive on the issue of title navigability, the case should have been set for a trial in which all issues, including floatplane use, could have been thoroughly explored. The fact that the decision below rested on factual assumptions either outside of or flatly contradicted by the record is illustrative of the evils which can result from the failure to conduct a hearing in a case like this. The summary disposition below of this novel, important, and fact-dependent case was legally erroneous, a substantial deviation from this Court's guidelines for resolution of cases of such significance, and justifies exercise of this Court's supervisory responsibilities.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue. Indeed, so clear is the error of the decision below, particularly with respect to the refusal to consider the facts in this fact-dependent case, that summary reversal is appropriate.

DATED this 28th day of June, 1985.

Respectfully submitted,

NORMAN C. GORSUCH
ATTORNEY GENERAL

KENNETH C. POWERS
ASSISTANT ATTORNEY GENERAL
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ALASKA, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, et al, *Defendants-Appellees.*	No. 84-3625 D.C. No. A81-265 Civ.

Appeal from the United States District Court
for the District of Alaska
District Judge James A. von der Heydt, Presiding

Argued and Submitted January 17, 1985

Filed February 28, 1985

OPINION

Before: WRIGHT and TANG, Circuit Judges, and THOMPSON,* District Judge.

WRIGHT, Circuit Judge:

This dispute over ownership of the bed of Slopbucket Lake raises an issue of first impression: whether floatplane use renders a small Alaska lake navigable for purposes of title under the "equal footing" doctrine. Our resolution of this issue potentially

---

*Senior Judge of the District of Nevada.

affects ownership of thousands of acres underlying small lakes throughout Alaska.

FACTS

Slopbucket Lake is a small lake (approximately 20 acres)[1] in South Central Alaska, just north of Lake Iliamna, a much larger navigable body of water. Slopbucket, which was once a part of Iliamna, is now separated from the larger lake by a natural sand beach between 75 and 100 feet wide, and about four feet high. It is used extensively as a landing and takeoff spot for floatplanes, because of frequent high winds and rough waters on Lake Iliamna.

Procedural History

On January 23, 1980, the Alaska State Office of the United States Department of the Interior, Bureau of Land Management (BLM), determined that the bed of Slopbucket Lake was federally owned "public land" available for conveyance to defendants Iliamna Natives Limited and Bristol Bay Native Corporation (BBNC), pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628.[2]

---

[1]There is some dispute over its exact size, with estimates ranging from 20 to 80 acres. The name "Slopbucket" was coined by previous Fish and Wildlife Service employees. Evidently, they lived in a cabin on the spit between Lakes Iliamna and Slopbucket, and would draw drinking water from Iliamna, then dump their slopbuckets on the other side of the spit. Lake Iliamna is the largest lake in Alaska, encompassing 1,150 square miles.

[2]Pursuant to 43 C.F.R. 2650.5-1(b) (1983), the BLM is charged with determining whether bodies of water located within native land selections made under ANCSA are navigable. Under BLM departmental policy, floatplane use is not considered a customary mode of travel upon water for purposes of title navigability. *See* Memorandum issued in 1976 by Hugh C. Garner, Associate Solicitor, BLM, Division of Energy and Resources. Excerpt of Record (E/R), Vol. III, pp. 456-471.

Effective December 5, 1983, all Alaska lakes over 50 acres in size are meandered in accordance with BLM, *Manual of Surveying Instructions*, (1973), and "Alaska Native corporations organized pursuant to [ANSCA] . . . shall not be charged for submerged lands beneath water bodies . . . meandered . . . ." BLM, *Interim Waiver of Regulations and Establishment of Policy*, 48 Fed. Reg. 54 483 (1983).

In April 1981, the state initiated this quiet title action, alleging that use of Slopbucket Lake by floatplanes and related watercraft rendered the lake navigable for title purposes.

Alaska moved for summary judgment on the ground that there was no genuine issue as to any material fact concerning (1) the extensive commercial use of Slopbucket Lake by floatplanes, both presently and at the time of statehood and (2) the fact that floatplanes constituted a customery mode of trade and travel on water at the time of statehood.

The federal defendants moved for partial summary judgment on the "ground that, as a matter of law, aircraft use does not render a water body navigable for purposes of determining ownership of the bed." Federal Defendants' Motion for Partial Summary Judgment. The district court denied the State's summary judgment motion and granted the defendants'. The court held that "'. . . floatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination." *Alaska v. United States*, 563 F. Supp. 1223, 1228 (D. Alaska 1983).

The State moved unsuccessfully for an amendment to the district court's order permitting an interlocutory appeal under 28 U.S.C § 1292(b). The State then waived any claim to the "navigability of Slopbucket Lake independent of the activities of floatplanes." Alaska's Motion to Vacate Trial. The motion was granted and judgment entered in favor of all defendants. Alaska appealed.

ANALYSIS

Standard of Review

An appeal from an order granting or denying a summary judgment is reviewed de novo. *Philpott v. A. H. Robins Co.*, 710 F.2d 1422, 1423 (9th Cir. 1983). All "evidence and factual inferences" must be viewed in the light most favorable to the adverse party

and the summary judgment may be upheld only if "there are no genuine issues of material fact and [the movant is] entitled to judgment as a matter of law." *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 104 S. Ct. 151 (1983).

Navigability

Under the "equal footing doctrine," the federal government holds title to the beds of navigable waterways "in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." *Montana v. United States*, 450 U.S. 544, 551 (1981).[3] Whether a particular body of water is navigable for purposes of title is a question of federal law. *Utah v. United States*, 403 U.S. 9, 10 (1971).

The federal test for navigability was first articulated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The Court said:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The issue in *Daniel Ball* was admiralty jurisdiction but the Supreme Court has adopted the same test for title purposes. *See, e.g., United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting

[3]The title is subject to Congress' paramount power over navigable waters under the Commerce Clause, and prior conveyances by Congress in certain limited circumstances not applicable here. *Montana*, 450 U.S. at 551-52. The Submerged Lands Act, 43 U.S.C §§ 1301-1315, confirms the State's existing rights under the equal footing doctrine. *See Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 n.19 (1973), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). The doctrine itself is grounded in the Constitution. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

Daniel Ball), *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 794 (9th Cir. 1982). Of course, we must consider the context in which a navigability determination is made before evaluating its precedential effect. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979).

However, when the central issue is navigability, a case applying the *Daniel Ball* test provides guidance. For instance, in *Riverfront Protection Ass'n*, 672 F.2d at 795, we looked for guidance to *Puget Sound Power & Light Co. v. FERC*, 644 F.2d 785, 788-89 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981), although in *Puget Sound* we were determining navigability for Commerce Clause purposes. However, we did so only after considering the difference between title navigability and Commerce clause analysis. *See Riverfront Protection Ass'n*, 672 F.2d at 794 n.1.

A. *The Mode of Transportation*

Alaska argues that floatplane use was a "customary [mode] of trade and travel on water" at the time of statehood. *Daniel Ball*, 77 U.S. at 563. Alaska points to language in *The Montello*, 87 U.S. 430, 441-42 (1874), where the Supreme Court said a river was "navigable in fact . . . [i]f it [is] capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted*. . . ". (emphasis added). The State contends that since floatplanes are a mode of commerce that operates partially on water, their use necessarily renders Slopbucket Lake navigable.

[2] Alaska reads *The Montello* too broadly. There, the Court based navigability on the use of shallow draft Durham boats propelled by animal power, and refused to limit navigability to waterways open only to steam or sail vessels. However, the crux of the test is still the requirement that the body of water be susceptible of use as a highway or channel for commerce on water. *Utah v. United States*, 403 U.S. at 11. This necessarily involves the utilization of the waterway as a path between two points.

We recognize that navigability is a flexible concept and "[e]ach application of [the *Daniel Ball* test] . . . is apt to uncover

variations and refinements which require further elaboration." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940) (navigability test applied in commerce clause analysis). For this reason, we have liberally construed the phrase "customary modes of trade and travel on water," *Daniel Ball*, 77 U.S. at 563, taking into account transportation methods in use at the time of statehood. *See, e.g., Riverfront Protection Ass'n*, 672 F.2d at 795 (floating logs—title navigability); *Puget Sound Power & Light Co.*, 644 F.2d at 788-89 (floating of shingle bolts sufficient for navigability in context of federal regulatory jurisdiction). Nevertheless, the central theme remains the movement of people or goods from point to point on the water.

Alaska argues that Slopbucket Lake is an integral part of an air and water highway over which floatplanes travel throughout the Bristol Bay region of Alaksa. However, in this context, the lake is a terminus or launching point for floatplanes, not "a *channel* for useful commerce." *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (emphasis added). The floatplanes go to and from the lake; they do not travel on the water.

Prior Treatment of Floatplane Use

A. *Case Law*

The reported decisions mentioning floatplane use in the context of title navigability provide little guidance. In *Steel Creek Development Corp. v. James*, 58 N.C. App. 506, 294 S.E. 2d 23, 27, *rev. denied*, 306 N.C. 740, 295 S.E.2d 763 (1982), the court in dictum dismissed evidence of floatplane use and recreational boating as insufficient to support a claim of navigability. In *Snively v. State*, 167 Wash. 385, 9 P.2d 773 (1932), the Washington Supreme Court squarely rejected the argument that the potential use of Angle Lake[4] as a landing spot for floatplanes rendered the lake navigable.

[4]Angle Lake is a small resort lake, located on the flight path between the southern end of Lake Washington and Tacoma.

The district court in *Minnehaha Creek Watershed Dist. v. Hoffman*, 449 F. Supp. 876, 880 (D. Minn. 1978), *aff'd in part, rev'd in part*, 597 F.2d 617 (8th Cir. 1979), mentioned floatplane use in an extensive laundry list of factors for determining jurisdiction under the Rivers and Harbors Act of 1899 § 10, 33 U.S.C. § 403. However, the other factors were much more substantial and the Eighth Circuit omitted any reference to floatplanes in the appellate opinion.

C. *Administrative Determination*

The BLM, pursuant to departmental policy, determined that Slopbucket Lake was not navigable.[5] In *United States v. Oregon*, 925 U.S. at 23, the Court said it was "not without significance that the disputed area [had] been treated as non-navigable both by the Secretary of the Interior and the Oregon courts."

Since we reach the same conclusion as did the BLM after *de novo* review, we need not decide whether or to what extent we should defer to the BLM's navigability determination when that determination is not before us for review.

CONCLUSION

For purposes of defendant's summary judgment motion, we assume that Slopbucket Lake was at the time of statehood and still is used extensively for takeoff and landing by floatplanes. Since "susceptibility . . . rather than . . . extent of actual use, is the

[5]Alaska argues this is inconsistent with a BLM determination that Slopbucket Lake is a "major waterway" for purposes of 43 C.F.R. § 2650.05(a) (1983), based on floatplane use. *See* BLM Memorandum dated May 20, 1982, E/R vol. I., pp. 205-206. Section 2650.05(a) defines a "major waterway" to include a "lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft including floatplanes . . . ." The BLM navigability determination is not before us, so we need not consider whether it is inconsistent with the regulation. However, the designation of a waterway as major for purposes of easements is qualitatively different from a title navigability determination. *See Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 678 (D. Alaska 1977).

crucial question," *United States v. Utah*, 283 U.S. at 82, further evidence would not aid our inquiry.

[1] We agree with the district court that use of Slopbucket Lake by floatplanes and related incidental watercraft is insufficient as a matter of law to render the lake navigable for purposes of title. Since Alaska waived all navigability claims independent of floatplanes, judgment for defendants was proper.

For the same reason, Alaska's summary judgment motion was properly denied.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ALASKA,
Plaintiff-Appellant,

vs

UNITED STATES OF AMERICA; WILLIAM CLARK, Secretary of the Interior; MICHAEL J. PENFOLD, Alaska State Director, Bureau of Land Management; BRISTOL BAY NATIVE CORP.; and ILIAMNA NATIVES LIMITED,
Defendants-Appellees.

No. 84-3625

DC# A81-265 Civil

ORDER CORRECTING OPINION

Before: WRIGHT and TANG, Circuit Judges, and THOMPSON, Senior District Judge.

The court has considered the motion of the state of Alaska to amend the opinion, together with the opposition filed by counsel for defendant-appellee, Bristol Bay Native Corporation. The motion is granted.

The opinion filed on February 28, 1985, is corrected as follows:

At page 9, line 7, of the opinion as filed, the words "and related incidental watercraft" are deleted. The paragraph at page 9, lines 6 through 10, is corrected to read:

> We agree with the district court that use of Slopbucket Lake by floatplanes is insufficient as a matter of law to render the lake navigable for purposes of title. Since Alaska waived all navigable claims independent of floatplanes, judgment for defendants was proper.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, vs UNITED STATES OF AMERICA; JAMES WATT, Secretary of the Interior; CURTIS V. McVEE, Alaska State Director, Bureau of Land Management; BRISTOL BAY NATIVE CORP.; and ILIAMNA NATIVES LIMITED, Defendants.	MEMORANDUM AND ORDER

A81-265 CIV

THIS CAUSE comes before the court on cross-motions for summary judgment. Jurisdiction exists based on 28 U.S.C. §§ 1331 and 1346(f).

I. *BACKGROUND*

The suit is primarily an action to quiet title to submerged lands beneath a small lake in southern Alaska.[1] The court is asked to rule on a unique and seldom litigated question, *viz.*, whether floatplane use may be considered in applying the federal navigability test for determining title to submerged lands. The lake at issue, Slopbucket Lake, is located just north of Iliamna Lake. On January 23, 1980,

[1]The State's pleadings refer to the lake as both twenty and eighty acres in size. Bristol Bay Native Corporation states that the lake is less than thirty acres. While this discrepancy constitutes a genuine issue of fact, it is not a material fact for the purpose of resolving the present motions.

the BLM concluded the lake was non-navigable for the purpose of determining the acreage and entitlement of native corporation land selections under the Alaska Native Claims Settlement Act (ANCSA). *See* 43 U.S.C. § 1611 (1976); 43 C.F.R. § 2650.5-1(b) (1982). This administrative decision is not being challenged in the present lawsuit. Interim conveyances for land beneath the lake were executed between the federal government and Native corporations pursuant to ANCSA. *See id.* § 2650.0-5(h) (1982). Iliamna Natives, Ltd. (Iliamna) was granted rights in the surface estate and Bristol Bay Native Corporation (BBNC) was granted rights to the subsurface estate. *See generally* 43 U.S.C. § 1613 (1976). The State of Alaska then brought this suit to quiet title to the lands beneath Slopbucket Lake.

The primary legal issue concerns application of the test for determining navigability for title. This test reflects a long-standing federal policy, first enunciated by the Supreme Court, regarding who owns title to much of the submerged land in our country.

In 1842, the Court acknowledged the English common law doctrine of public trust to the effect that "dominion and property in navigable waters, and in the lands under them [were] held by the king as a public trust. . . ." *Martin v. Waddell*, 41 U.S. 234, 263; 16 Pet. 367, 411 (1842). It further declared that once the Revolution took place, "the people of each state became themselves sovereign; and in that character [held] the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 262-63, 16 Pet. at 410. *Martin v. Waddell* dealt with one of the original thirteen state's (New Jersey) right to submerged land. Shortly thereafter, the Supreme Court made clear that new states have the same rights to submerged lands as did the original states. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845). Hence, under what is commonly referred to as the doctrine of equal footing, newly admitted states to the Union acquire the same property interests in submerged lands as that enjoyed by the thirteen original states succeeding to the British Crown. *Utah v. United States*, 403 U.S. 9, 10 (1971). *See Montana v. United States*, 450 U.S. 544, 551 (1981); *Oklahoma*

v. Texas, 258 U.S. 574, 583 (1922). The States' absolute right to lands underlying navigable waters within their boundaries is recognized by Congress,[2] but conferred by the Constitution. *See Oregon ex. rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The central inquiry for determining title to submerged lands focuses on the concept of navigability as defined by the Supreme Court. Case law makes clear that navigability for this purpose is a question of federal law to be determined by the rule recognized and applied in the federal courts. *United States v. Oregon*, 295 U.S. 1, 13 (1935); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926).

A body of water is navigable under federal law when it is used or susceptible of use in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). This test has not changed since its inception. Courts applying the test should be aware, however, that the concept of navigability is used for different purposes.[3] In this case, the navigability test is being used for the purpose of determining title to submerged land.

Much case law has been written in elucidating precise meanings for various words in the definition for navigability. Some of these cases reflect an expansion of the type of waterbodies that may be considered in determining navigability. The Supreme Court has expanded, beyond the rule at English common law,[4] the types of

---

[2]*See e.g.*, Submerged Lands Act, § 2(a), 430 U.S.C. § 1301(a) (1976); Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958).

[3]*See, e.g, Utah v. United States*, 403 U.S. 9 (1971) (navigability determined in resolving title to land); *United States v. Appalachian Electric Power co.*, 311 U.S. 377 (1940) (navigability determined regarding Congress' power to license construction of dams pursuant to Commerce Clause); *The Robert W. Parson*, 191 U.S. 17 (1903) (navigability determined regarding admiralty jurisdiction).

[4]At common law, the test for navigability extended only to those waters subject to the ebb and flow of the tide. *See The Daniel Ball*, 77 U.S. (10 Wall.) at 563. *See also, The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825).

waterbodies that may be deemed navigable for the purpose of determining title. Non-tidal as well as tidal bodies of water may be regarded as navigable. *Barney v. Keokuk*, 94 U.S. (IV Otto) 324, 328 (1876). Lakes also may be deemed navigable for this purpose. *See Utah v. United States*, 403 U.S. at 11. Hence, it is conceivable that although Slopbucket Lake is a non-tidal body of water, it might be deemed navigable for the purpose at issue.

II. THE SUMMARY JUDGMENT MOTIONS

Federal defendants seek partial summary judgment to the effect that aircraft use cannot render a waterbody navigable for the purpose of determining navigability for title. The State's cross-motion for summary judgment requests the court to rule as a matter of law that Slopbucket Lake was navigable in its entirety on the date Alaska entered the Union, and title to the bed of the lake vested in the State on that date.

A. Federal Defendants' Motion

For the purpose of their motion, federal defendants concede the truth of the State's factual allegations concerning floatplane use on Slopbucket Lake. They maintain, however, that floatplane use is irrelevant to determinations of navigability for title.

Given the fact that the navigability test is used for different purposes, courts have occasionally recognized the need to distinguish the purpose for which a navigability determination is being made. *See Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979); *Oregon v. Riverfront Protection Association*, 672 F.2d 792, 794 n. 1 (9th Cir. 1982); *North Dakota ex rel. Board of University and School Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982). This need arises in the present case, but for a reason previously unaddressed.

The court perceives a need to distinguish those cases in which navigability was determined concerning the power to regulate under the Commerce Clause from cases in which navigability was decided for title purposes. In *The Montello*, 87 U.S. (20 Wall.) 430 (1874), the Supreme Court liberalized the navigability test stated in *The*

Daniel Ball. Both of these cases involved a navigability determination relative to Congress' power to regulate under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. *The Montello* holding may be interpreted as a recognition that any mode of conducting commerce may be considered in determining navigability. *See* 87 U.S. (20 Wall.) at 441-42. The court believes this to be true insofar as the Commerce Clause is at issue. It is especially true considering that since the time *The Montello* was decided, Congress' power under the Commerce Clause has greatly increased. A finding of navigability is no longer even necessary in order for Congress to be able to regulate commerce on a waterbody. *See Kaiser Aetna v. Riverfront Protection Association*, 444 U.S. at 173-74. There is no case involving navigability for title, however, in which a court has intimated that any and all modes of conducting commerce may be considered in making the navigability determination.

While the navigability test of *The Daniel Ball* has lost its importance regarding Commerce Clause analysis, it remains the starting point in determining navigability for resolving title to submerged land. *See Utah v. United States*, 403 U.S. at 11. The Supreme Court recognizes that each application of the *Daniel Ball* test is "apt to uncover variations and refinements which require further elaboration." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940). These words ring true in the present case. No federal court decision exists in which floatplane activity was considered in determining navigability for title., The phenomenon is no doubt due in part to the fact that floatplanes did not exist until the twentieth century, and few states have joined the Union since that development.

The State makes many arguments in opposition to federal defendants' motion, and not all of them need be addressed. Much emphasis is placed by the State on the portion of the navigability test regarding the mode by which commerce is or may be conducted. *See The Daniel Ball*, 77 U.S. (10 Wall.) at 563. The court believes this factor is the pivotal consideration in the present case. There is no need for the court to address other elements of the navigability test if it is initially determined that floatplane use is legally irrelevant to the analysis.

The State proposes that the mode element of the test should be liberally construed to include floatplanes, and in support thereof acknowledges the following Supreme Court reasoning:

> [T]he true test of navigability . . . does not depend on the mode by which commerce is or may be conducted . . . The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river [waterbody], rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted*, it is navigable in fact, and becomes in law a public river or highway.

The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874) (emphasis added).

The above quote does not stand for the proposition that *any* mode of commerce may be considered in applying the test of navigability for title. *The Montello* concerned a navigability determination for a purpose related to Congress' authority to regulate under the Commerce Clause, so any type of mode might have been properly considered. A narrower construction is necessary when navigability is being determined for the purpose of resolving title to submerged land.[5]

The test set forth in *The Daniel Ball* refers to "customary modes in which such commerce is conducted *by water*." 77 U.S. (10 Wall.) at 563 (emphasis added). The State might well be able to persuade the trier of fact that floatplanes constitute a customary mode of conducting commerce in Alaska. It is also true that

---

[5]In *George v. Beavark, Inc.*, the Eighth Circuit stated it was "wary of unnecessary extension of any rule on navigability, particularly when it could well lead to absurdity." 402 F.2d 977, 981 (8th Cir. 1968). Absurd results would no doubt occur in the present case if floatplane use were deemed legally relevant in determining navigability for title. There are over three million lakes in Alaska and a great number of them are accessible by floatplane. A ruling in favor of the State would severely complicate the land selection scheme in Alaska which Congress set forth in the Alaska Statehood Act and ANCSA. *See* Alaska Statehood Act, Pub. L. No. 85-508, § 6(a), 72 Stat. 340 (1958); Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1976).

floatplane activity occurs, in part at least, upon the water. The court rules as a matter of law, however, that floatplanes may not be considered a mode of conducting commerce *on water* for the purpose of determining navigability for title. The court interprets the navigability test, insofar as it is used to determine title to submerged lands, to be limited to consideration of modes of commerce that operate primarily on the water. That is, the mode must be primarily waterborne in nature. Hence, conventional waterborne vessels that do not leave the water are modes of conducting commerce within the *Daniel Ball* test. *See, e.g., Utah v. United States*, 403 U.S. at 11-12 (passenger boats, excursion boats, livestock boats); *United States v. Utah*, 283 U.S. 64, 82 (1931) (rowboats, flatboats, barges, steamboats); *United States v. Holt State Bank*, 270 U.S. at 56 (sailing vessels). Conventional waterborne vessels that are temporarily removed from the water, *e.g.*, to portage, are also modes within the test of navigability for title. *See United States v. Oregon*, 295 U.,S. at 21 (canvas canoes); *North Dakota ex rel. Board of University and School Lands v. Andrus*, 671 F.2d at 277-78 (canoes). In addition, it is not even necessary that a vessel be used in conducting the commerce. The mere floating of logs has been considered a mode of conducting commerce wihin the *Daniel Ball* test. *See Oregon v. Riverfront Protection Association*, 672 F.2d at 795.

All the previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted primarily on the water itself. Since floatplanes operate primarily in the air as opposed to the water, they are not a mode of conducting commerce on water for the purpose of the test. The court does not accept as controlling the State's argument that floatplane activity on the water is part of a continuous joint air-water highway over which commerce is conducted. The argument has merit in determining whether Congress has power to regulate via the Commerce Clause. As stated previously, however, the navigability test in the present case is being applied for a different purpose.

Federal defendants have postured their motion seeking a ruling as to aircraft in general, yet their memorandum focuses only on floatplane use. While it is conceivable the present ruling will also

be applicable to uses by skiplanes, helicopters and all other aircraft capable of landing on water but operating primarily in the air, this memorandum and order addresses only floatplane use. The court therefore grants partial summary judgment to the federal defendants to the effect that floatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination.

B. *Plaintiff's Motion*

The State seeks summary judgment to the effect that Slopbucket Lake was navigable in its entirety on January 3, 1959, when Alaska became a State, and that title to the bed of the lake vested in the State of Alaska on that date. The memorandum accompanying the State's motion emphasizes that the court need only rule on whether the floatplane mode of conducting commerce on water may be ignored in making navigability determinations.

As the preceding analysis indicates, floatplane activities are legally irrelevant in making navigability determinations for the purpose of resolving title to submerged lands. This ruling must be construed narrowly, however, so as not to preclude consideration of floatplane activities in navigability determinations related to admiralty jurisdiction or Congress' power under the Commerce Clause. Summary judgment is therefore denied the State.

Accordingly, IT IS ORDERED:

1) THAT partial summary judgment is granted federal defendants to the effect that floatplane activities are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination.

2) THAT summary judgment is denied plaintiff.

DATED this 12th day of May, 1983, at Anchorage, Alaska.

s/ JAMES A. VON DER HEYDT
United States District Judge

cc: U.S. Attorney
John D. Foster
Kenneth C. Powers
Robert H. Hume, Jr.
Douglas B. Baily

APPENDIX D

United States District Court
District of Alaska

STATE OF ALASKA v. UNITED STATES OF AMERICA, JAMES WATT, Secretary of the Interior, CURTIS V. MCVEE, *et al*	**JUDGMENT IN A CIVIL CASE** Docket Number A81-265 CIV

Presiding Judge: James A. von der Heydt

☐ *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ *Decision by Court.* This action came for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

PLAINTIFF'S complaint requesting that Slopbucket Lake be declared a navigable waterbody and that title to the lakebed be quieted in the name of the State is dismissed with prejudice. Judgment is entered in favor of all defendants.

APPROVED:

s/ JAMES A. VON DER HEYDT

James A. von der Heydt
Chief Judge, U.S. District Court

DATE: January 20, 1984

Supreme Court, U.S.
FILED
JUL 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-78

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ALASKA,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

FREDERICK H. BONESS
PRESTON, THORGRIMSON,
ELLIS & HOLMAN
420 "L" Street, Suite 404
Anchorage, Alaska 99501
(907) 276-1969

Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

12pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD BE DENIED 4

1. The District Court and the Court of Appeals Fully Considered the Issue and Correctly Decided the Case 4

2. The Issue Presented by the State of Alaska's Petition Has No National Significance or Adverse Public Policy Consequences and Thus Does Not Merit This Court's Review 6

3. The Petition for Certiorari Presents Only One Question; Not Two as Stated by Petitioner ... 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: Page

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) 4, 7

Hardin v. *Jordan*, 140 U.S. 371 (1891) 5

Harrison v. *Fite*, 148 F. 371 (8th Cir. 1906) 5

Martin v. *Waddell*, 41 U.S. (16 Pet.) 234 (1842) 4

Minnehaha Creek Watershed Dist. v. *Hoffman*, 449 F. Supp. 876, 880 (D. Minn. 1978) *aff'd in part, rev'd in part*, 597 F.2d 617 (8th Cir. 1979) 6

Oregon v. *Riverfront Protection Ass'n*, 672 F.2d 792 (9th Cir. 1982) 4

Pollard's Lessee v. *Hagen*, 44 U.S. (3 How.) 212 (1845) 4

Snively v. *State*, 167 Wash. 385, 9 P.2d 773 (1932) 6

State v. *Adams*, 89 N.W.2d 661 (Minn. 1958) 5

Steel Creek Development Corp. v. *James*, 58 N.C. 506, 294 S.E.2d 23, *rve. denied*, 306 N.C. 740, 295 S.E.2d 763 (1982) 6

United States v. *Holt State Bank*, 270 U.S. 49 (1925) . 5, 6

United States v. *Ladley*, 42 F.2d 474 (D. Idaho 1930) .. 5

United States v. *Utah*, 283 U.S. 64 (1931) 4, 7

Watt v. *Alaska*, 451 U.S. 259 (1981) 7

STATUTES:

Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 7

Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-78

STATE OF ALASKA,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Bristol Bay Native Corporation, respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit. That opinion is reported at 754 F.2d 851. The District Court opinion is reported at 563 F. Supp. 1223 (D. Ak. 1983).

STATEMENT OF THE CASE

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* ("Settlement Act"), which was enacted to settle aboriginal land claims of the Native peoples of Alaska, required Alaska Natives to organize into 12 regional corporations and more than 200 village corporations. As part of the settlement, these corporations are entitled to receive title to approximately 40 million acres of land throughout Alaska. The Secretary of the Department of the Interior is responsible for administering the Settlement Act and for conveying land to the Native corporations.

Pursuant to the Settlement Act, Iliamna Natives Limited ("Iliamna"), a village corporation, and Bristol Bay Native Corporation ("Bristol Bay"), a regional corporation, selected certain land adjacent to Lake Iliamna, the largest lake in Alaska. Located on the lands selected by Iliamna and Bristol Bay is a small lake commonly known as "Slopbucket Lake." As part of the process of adjudicating the selected lands, the Secretary determined that Slopbucket Lake was not navigable and that therefore the bed of Slopbucket Lake was public land. Accordingly, in 1980, the Secretary conveyed, by interim conveyance, the surface estate of the selected lands, including the bed of Slopbucket Lake, to Iliamna and the subsurface estate, including the bed of Slopbucket Lake, to Bristol Bay.

In 1981, the State of Alaska filed suit against the United States, Iliamna, and Bristol Bay to quiet title to the bed of Slopbucket Lake in the State. The State's complaint alleged that Slopbucket Lake is a navigable lake and that therefore, under the Equal Footing Doc-

trines, and other applicable legal doctrine, the State of Alaska owns the bed of Slopbucket Lake. The State based its claim that Slopbucket Lake is navigable principally on the fact that the lake had been used by floatplanes for take-offs and landings prior to Alaska's admission to the Union.

Bristol Bay and other non-Native Defendants answered the State's claim asserting that floatplane usage alone could not render a lake navigable for title purposes. The issue of floatplane usage as the sole basis for title navigability was presented to the District Court through the State of Alaska's Motion for Partial Summary Judgment and the United State's Motion to Dismiss.

The District Court reasoned that "[a]ll previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted principally on the water itself . . ." 563 F. Supp. at 1228. The District Court concluded by holding that "[s]ince floatplanes operate primarily in the air as opposed to the water, they are not a mode of conducting commerce on water for the purpose of the test." *Id.* The State of Alaska thereafter decided to waive its right to present evidence of usage other than floatplanes and the District Court therefore dismissed the State's complaint to quiet title to Slopbucket Lake in the State of Alaska.

The Court of Appeals affirmed the District Court decision applying much the same reasoning. The Court of Appeals noted that the central theme of title navigability cases is that there must be "movement of people and goods from point to point on the water."

754 F.2d at 854. The Court of Appeals further explained that a lake "is a terminus or launching point for floatplanes, not, 'a *channel* for useful commerce.' (*citation omitted.*) The floatplanes go to and from the lake, they do not travel on the water." *Id.*

This case, therefore, presents solely the issue of whether the State of Alaska owns the land and natural resources under a small, isolated lake accessible only by floatplane.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The District Court and Court of Appeals Fully Considered the Issue and Correctly Decided the Case.

Since the mid 19th century, this Court has held that a State, upon admission to the Union of States, acquires fee simple title to the land under waters which are used or susceptible of use in their ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870); *Pollard's Lessee* v. *Hagen,* 44 U.S. (3 How.) 212 (1845); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 234 (1842). Both this Court and the Court of Appeals for the Ninth Circuit have recognized a broad range of uses to be sufficient to prove title navigability. *See e.g., United States* v. *Utah,* 283 U.S. 64, 82-83 (1931) (small boats); *Oregon* v. *Riverfront Protection Ass'n.,* 672 F.2d 792 (9th Cir. 1982) (holding that use of a river for floating logs to market was sufficient to establish title navigability). However, it is equally well established that some uses of a waterbody, if slight or incidental or not part of trade and commerce, are not sufficient to

render that water body navigable for title purposes. In particular, the courts have uniformly held that small, isolated lakes are not navigable for title purposes. *See e.g., Harrison* v. *Fite,* 148 F. 781 (8th Cir. 1906); *United States* v. *Ladley,* 42 F.2d 474 (D. Idaho 1930); *State* v. *Adams,* 89 N.W.2d 661, 677 n.1 (Minn. 1958) (citing 19 cases in which small lakes were found non-navigable).

The decisions of both the District Court and Court of Appeals recognized that there are limits on the principle of navigability for title purposes and that floatplane usage does not satisfy the minimum requirements. Each court held that use of a lake for take-offs and landings of a floatplane is not equivalent to use of the lake for trade and travel as a highway or channel for commerce on water. The Court of Appeals stated: "[Use of water for trade and travel] necessarily involves the utilization of the waterway as a path between two points." 754 F.2d at 854. The District Court stated it only slightly differently:

> All previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted primarily on the water itself.

Case law makes clear that use of water must be an integral part of the transportation route and not a use which is merely incidental to travel by another mode. *Compare Hardin* v. *Jordan,* 140 U.S. 371, 396 (1891) *with United States* v. *Holt State Bank,* 270 U.S. 49 (1925). In reaching their respective conclusions, both courts were following well established case precedent.

2. The Issue Presented by The State of Alaska's Petition Has No National Significance or Adverse Public Policy Consequences and Thus Does Not Merit This Court's Review.

Prior to this case, three reported decisions have referred to floatplane usage in discussing title navigability issues. However, none of these cases were decided on the basis of floatplane usage and none suggest that such usage alone would suffice. *See Minnehaha Creek Watershed Dist.* v. *Hoffman,* 449 F. Supp. 876, 880 (D. Minn. 1978) *aff'd in part, rev'd in part,* 597 F.2d 617 (8th Cir. 1979); *Steel Creek Development Corp.* v. *James,* 58 N.C. 506, 294 S.E.2d 23, 27 *rev. denied* 306 N.C. 740, 295 S.E.2d 763 (1982); *Snively* v. *State,* 167 Wash. 385, 9 P.2d 773 (1932).

The paucity of cases dealing with floatplanes is due, no doubt, to the narrowness of the issue. Under established case precedent, navigability must be determined as of the date a State is admitted to the Union. *United States* v. *Holt State Bank,* 270 U.S. 49, 56 (1926). Since only Alaska and Hawaii were admitted as States after the commercial use of floatplanes came into being, only the States of Alaska and Hawaii are in a legal position to advance a claim of ownership to the beds of small, isolated lakes based on floatplane usage. Since Hawaii has few, if any, lakes and rivers which are used exclusively by floatplanes, the issue has legal significance solely to the State of Alaska.

Had the Court of Appeals held in favor of the State of Alaska, its decision would have had serious adverse public policy consequences. There are more than 3 million inland lakes in Alaska. Most of these lakes are small, shallow and isolated from all means

of transportation except floatplanes. If the Court of Appeals had held that floatplane usage is sufficient to establish navigability, then the State of Alaska would have received title to land and resources under these small isolated lakes.* This would be a tremendous windfall for Alaska when compared to lower 48 states since title to the beds of small, isolated lakes is not a benefit other states have received. Furthermore, a holding in favor of the State of Alaska would have created numerous islands of State owned land within the lands conveyed to Native corporations pursuant to the Settlement Act and similar "holes" of State owned land in the national parks, wildlife refuges, wild and scenic rivers and wilderness areas created by the Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 (1980). Indeed, in parts of northern and western Alaska, Native selections and national parks would become verit-

---

* It is sufficient to establish navigability for title purposes to show that a waterbody is susceptible to use; proof of actual use is not necessary. *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1871); *United States* v. *Utah*, 283 U.S. 64 (1931). In its Petition for Writ of Certiorari, the State argues that a decision favorable to the State "would not automatically have determined the navigability of any other waterbody in Alaska." Petition at 13 n.2 (con't.). This assertion is not consistent with the foregoing case law and also is *not* consistent with the State's previous assertions in the District Court that Slopbucket Lake is a "test case." *See* C.R. 128, at p. 13 (Transcript of Oral Argument); unnumbered docket entry dated April 4, 1984, at p. 4 (transcript of Oral Argument on Motion for Protective Order). Moreover, if the State's current proposition is accepted, its Petition is totally without merit since this case becomes simply a dispute over title to a few acres of submerged land, and even if wrongly decided, does not merit this Court's attention. *Cf. Watt* v. *Alaska*, 451 U.S. 259, 274-275 (1981) (Justice Stevens concurring).

able swiss cheese pocked with hundreds of islands of State owned land.

Because the Court of Appeals ruled in accordance with established case precedent concerning title navigability, none of the adverse public policy consequences discussed above has occurred. Ownership of the land and mineral resources under numerous small, isolated lakes throughout Alaska will be determined according to the same principles applicable to small, isolated lakes in the lower 48 States and most will be found non-navigable. The State of Alaska is not mistreated in comparison with its sister states. The reasonable expectations which existed at the time of statehood and during the first decade of Alaska's statehood (that is, prior to development of the novel argument concerning floatplane usage) are not upset and there is not a major and unanticipated intrusion of State inholdings into national parks, wildlife refuges, wild and scenic rivers, and wilderness areas. For these reasons then, this case does not present any major public policy issues.

Nor does the decision below have great significance for future cases or other appellate circuits. Even in its broadest context, the decision below has limited utility and precedential importance because floatplane usage to establish navigability for title purposes is simply too narrow an issue to have national significance and it is highly unlikely it will arise in any other Circuit.

In short, this case does not present any significant legal issue, major public policy issue, or grievous injustice which requires this Court's grant of the Petition for Writ of Certiorari.

3. The Petition for Writ of Certiorari Presents Only One Question; Not Two as Stated by Petitioner.

The State of Alaska's second question does not offer a separate ground for review. Both the District Court and the Court of Appeals accepted the State's factual assertions that Slopbucket Lake was used by floatplanes both before and after Alaska became a State. *See* 563 F. Supp. at 1228; 754 F.2d at 885. The District Court and Court of Appeals both ruled *as a matter of law* that floatplane usage standing alone, no matter how extensive, could not serve as the basis for proving title navigability. There is nothing more for the State to prove at trial. The State's second question, therefore, amounts simply to a restatement of its first question, namely, that this case presents the issue of whether floatplane usage may serve as the basis for title navigability and that issue does not merit consideration by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FREDERICK H. BONESS
PRESTON, THORGRIMSON,
ELLIS & HOLMAN
420 "L" Street, Suite 404
Anchorage, Alaska 99501
(907) 276-1969

Counsel for Respondent

July 31, 1985.

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-78 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ALASKA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
BLAKE A. WATSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

18 pp

QUESTION PRESENTED

Whether a lake is rendered navigable, for purposes of determining ownership of its bed, solely because floatplanes use the lake for takeoffs and landings.

TABLE OF AUTHORITIES

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 12

TABLE OF CONTENTS

Cases:

Alaska Public Easement Defense Fund v. *Andrus,* 435 F. Supp. 664 ..... 10, 11

Brewer-Elliott Oil & Gas Co. v. *United States,* 260 U.S. 77 8

Monroe v. *State,* 111 Utah 1, 175 P.2d 759 7

Pollard v. *Hagan,* 44 U.S. (3How.) 212 7

Proctor v. *Sim,* 134 Wash. 606, 236 P. 114 7

Snively v. *State,* 167 Wash. 385, 9 P.2d 773 7

Sporhase v. *Nebraska,* 458 U.S. 941 9

State v. *Bollenbach,* 241 Minn. 103, 63 N.W.2d 278 7

State of Oregon v. *Riverfront Protection Ass'n,* 672 F.2d 792 7

The Daniel Ball, 77 U.S. (10 Wall.) 557 ..... 3, 4, 6, 8, 9

Page

Cases—Continued:

The Montello, 87 U.S. (20 Wall.) 430 ..... 4, 5, 7, 8

United States v. *Appalachian Electric Power Co.*, 311 U.S. 377 7

United States v. *Holt State Bank*, 270 U.S. 49 ..... 5, 7

United States v. *Oregon*, 295 U.S. 1 8

Utah v. *United States*, 403 U.S. 9 6-7

Wernberg v. *State*, 516 P.2d 1191 10

Constitution, statutes and regulations:

Alaska Const. Art. VIII, § 3 9

Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* 2

43 U.S.C. 1611 2
43 U.S.C. 1613 2
43 U.S.C. 1613(c) 10
43 U.S.C. 1613(c)(3) 10
43 U.S.C. 1613(c)(4) 10
43 U.S.C. 1616(b) 10
43 U.S.C. 1616(b)(1) 10-11
43 U.S.C. 1616 note 10

Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343 2

Alaska Stat. § 46.15.030 (1982) 9

Submerged Lands Act, 43 U.S.C. 1301 *et seq.* 2

28 U.S.C. 1292(b) 4

Page

Constitution, statutes and regulations—Continued:

43 C.F.R. :

Section 2650.0-5(o) 10

Section 2650.4-7 10

Section 2650.5-1(b) 2

Miscellaneous:

MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water,* 3 Fla. St. U. L. Rev. 511 (1975) 10

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-78

STATE OF ALASKA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8), as amended (Pet. App. B1), is reported at 754 F.2d 851. The opinion of the district court (Pet. App. C1-C9) is reported at 563 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. On May 22, 1985, Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including June 28, 1985. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the Equal Footing Doctrine, each of the states, upon admission to the Union, is vested with title to lands beneath inland navigable waters within its boundaries. The issue in this case is whether a state may establish that a lake is navigable, and that the state therefore owns the submerged lands, simply by showing that floatplanes use the lake for takeoffs and landings.

1. Petitioner, the State of Alaska, brought this suit to quiet title to the bed of Slopbucket Lake, a small body of water located near Iliamna Lake in southern Alaska (Pet. App. A2-A3, C1). Petitioner alleged that Slopbucket Lake is navigable in its entirety and that title to the bed of the lake therefore passed to Alaska at statehood under the Equal Footing Doctrine (*id.* at A3-A4, C2-C3).[1] Prior to this suit, the Department of the Interior's Bureau of Land Management (BLM) had concluded that the lake was non-navigable (*id.* at A2, C1-C2). That determination was made for the purpose of assessing the acreage entitlement of native corporation land selections under the Alaska Native Claims Scttlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*[2]

---

[1]Petitioner also relied upon the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, and Section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343. See Pet. App. A3-A4, C2-C3.

[2]The BLM is charged with responsibility under ANCSA for determining whether bodies of water located within native acreage selections are non-navigable and, hence, whether the lands beneath those waters are federally owned "public lands" available for conveyance to native corporations under the Act. 43 C.F.R. 2650.5-1(b). See 43 U.S.C. 1611. Based on the BLM's determination, the United States executed interim conveyances granting the surface of Slopbucket's lakebed to respondent Iliamna Natives, Ltd. and the subsurface estate of the lakebed to respondent Bristol Bay Native Corporation (Pet. App. C2). See 43 U.S.C. 1613. Petitioner did not directly challenge the BLM's determination that Slopbucket Lake was non-navigable (Pet. App. C2). It did assert, however, that the United States lacked authority to convey any

Petitioner moved for summary judgment, contending that Slopbucket Lake was used at the time of statehood by floatplanes, that floatplanes are a customary mode of trade and travel in Alaska, and that, as a matter of law, floatplane use renders a lake navigable for purposes of determining ownership of the lakebed (Pet. App. A3, C4). The federal defendants simultaneously moved for partial summary judgment that aircraft use of a lake for takeoff and landing does not, as a matter of law, render a body of water navigable for purposes of determining title (*ibid.*) The federal defendants argued that, even if petitioner's factual allegations concerning floatplane use on Slopbucket Lake were true, evidence of floatplane use could not satisfy the federal navigability test (*ibid.*).

The district court granted the federal defendants' motion and denied petitioner's motion (Pet. App. C8). The court, relying upon the classic definition of navigability announced by this Court in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870), recognized that "[a] body of water is navigable under federal law when it is used or susceptible of use in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water" (Pet. App. C3). The court held that floatplane use did not establish navigability under this test.

The court specifically ruled that "floatplanes may not be considered a mode of conducting commerce *on water* for the purpose of determining navigability for title" (Pet. App. C7, emphasis in original). The court noted that "[a]ll the previously recognized modes of conducting commerce in determining navigability for title involve either vessels or

---

interest in the bed of Slopbucket Lake and sought declarative and injunctive relief preventing the transfer of title from the federal government to the native corporations.

III
DECISIONS BELOW

The decision of the Court of Appeals below is reported at 754 F.2d 851. The decision of the district court appears at 563 F.Supp. 1223.

IV
REASONS FOR GRANTING THE WRIT

This petition for certiorari presents the Court with a simple, straight-forward legal issue: the legal status of commercial floatplane operations in litigation where a state is seeking to perfect its sovereign title to the bed of a navigable waterway. Applicable decisions of both this and other federal and state appellate courts indicate that such use by floatplanes is fully relevant in determining navigability for federal title purposes.

A. Longstanding Federal Precedent Establishes That Navigability for Title Purposes Is a Broad and Flexible Concept

The Supreme Court has repeatedly emphasized the dymamic nature of the test of navigability for title purposes. The decision of the Court of Appeals, however, adopts a different course by eliminating one particular mode of waterway commerce—floatplanes—from consideration on the issue of whether a river or lake is navigable for purposes of determining title to the bed.

The title test of navigability began as a broad and flexible concept when first laid down in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870):

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The related principles which this Court has evolved further exemplify the flexible construction of the navigability test. For example, navigability does not depend on the particular mode of use. The requisite navigation may be by any "customary method of trade or travel." (*The Daniel Ball, supra,* 77 U.S. at 563; *United States v. Holt State Bank,* 270 U.S. 49, 56 (1926).)

Floatplanes are the customary mode of trade and travel on waterbodies such as Slopbucket Lake. By excluding such use concerning the issue of navigability for title purposes, the decision of the Court of Appeals potentially narrows the navigability test, reducing the ability of states to perfect their sovereign title claims.[2]

The decision below stands in contrast to decisions by this Court finding another type of unconventional navigation—logging drives—meaningful evidence of navigability. In *St. Anthony Falls Water Power Co. v. St. Paul Comm.,* 168 U.S. 349, 359 (1897), the Court held the Mississippi River navigable at St. Anthony Falls based on evidence of flotation of logs at that point. Similarly, transportation of timber and lumber, boated and rafted down a difficult stretch of New River in Virginia were found to constitute evidence of navigability in *United States v. Appalachian Power Co., supra,* 311 U.S. 377, 411. Like floatplane use, transportation

---

[2] The Decision of the District Court, which the Court of Appeals affirmed, was also unduly narrow and erroneous, in three respects. First, the district court apparently treated the navigability test as more stringent for title than for Commerce Clause purposes. In fact, the test differs only in that navigability under the Commerce Clause may arise after statehood and as a result of reasonable improvements, with an effective interstate link required. (*United States v. Appalachian Power Co.,* 311 U.S. 377, 406-408 (1940).) Second, the district court decision cites absolutely no authority for its incorrect view that the use involved must be "primarily waterborne in nature." (563 F.Supp. at 1227.) Third, the district court improperly premised its denial of Alaska's sovereign title to the bed of Slopbucket Lake on the view that a contrary ruling "would severely complicate the federal land selection scheme." (Id., at 1227 (fn. 5).) Significantly, the opinion of the Court of Appeals neither corrects these errors nor clarifies the applicable law.

of logs and timber products depend on water for only a portion of their overall journey. For example, it is usually necessary to transport these materials by land from the logging site to a lake or river. Following water transport, animals or machines have commonly been used to move these resources overland to their ultimate destination.

The circuit courts, including the Ninth Circuit, also have held repeatedly that transportation of logs and timber products is sufficient to prove navigability. (*Loving v. Alexander* 745 F.2d 861 (4th Cir. 1984); *State of Oregon v. Riverfront Protective Ass'n.*, 672 F.2d 792 (9th Cir. 1982); see also, *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785, 788-789 (9th Cir. 1981), cert. den. 454 U.S. 1053 (1981); *Wisconsin v. Federal Power Comm.*, 214 F.2d 334, 336 (7th Cir. 1954), cert. den. 348 U.S. 883 (1954).) Logging drives, while perhaps not a conventional mode of navigation, thusly satisfy the flexible and expansive title test of navigability. Floatplane use deserves comparable consideration.

B. Floatplanes Constitute Proper Evidence of Navigability Under Judicial Precedents, Administrative Decisions Issued by Appellees Themselves, and Federal Statutes and Regulations

The issue in this case has not heretofore been addressed by the federal courts. Yet the relevance of floatplane use to determine a waterway's navigability for sovereign title purposes is mandated by analogous judicial precedents, federal statutes, and regulations, the government's own administrative decisions and—most importantly—the flexible nature of the general federal test of navigability itself.

The navigability standard, like American constitutional law generally, has permitted the flexibility necessary to respond to technological change and societal growth. The first navigability cases, which dealt with admiralty rather than title disputes, were prophetic in anticipating this need. The language of *The Montello*, 87 U.S. (20 Wall.) 430, 441-442, contrasts with the Court of Appeals' more narrow construction of that case:

> "If [a waterway] be capable in its natural state of being used for purposes of commerce, *no matter in which mode the commerce may be conducted*, it is navigable in fact and becomes in law a public river or highway. Vessels *of any kind* that can float upon the water . . . are or *may become, the mode by which a vast commerce can be conducted*, and *it would be a mischievous rule that would exclude either in determining the navigability of a river.*" (Emphases added.)

This Court reiterated this fundamental point when it reviewed the first century of navigability jurisprudence in *United States v. Appalachian Electric Power Co., supra*, 311 U.S. 337, 405-406:

> "It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the western mountains. *The test as to navigability must take these variations into consideration.*
>
> "*. . . Each application of this test . . . is apt to uncover variations and refinements which require further elaboration.*" (Fns. omitted; emphasis added.)

The Court expanded upon this notion in more recent cases upholding Utah's sovereign claims to the beds of its lakes and rivers:

> "[A]s the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored . . . . The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources." (*United States v. Utah*, 283 U.S. 64, 83 (1931).)

Floatplane use, while relatively novel, represents the type of technological adaption to the needs of commerce which the federal navigability test traditionally has accommodated. Floatplanes have developed to serve Alaska's citizens in a multitude of

ways, and these craft are wholly dependent on waterways such as Slopbucket Lake for their operation. Like *The Montello*, this case concerns a craft, capable of floating on water, that indisputably forms a vital link of Alaskan commerce. Floatplanes use the lake "as a highway and that is the gist of the federal test." (*Utah v. United States*, 403 U.S. 9, 11 (1971).)

Notably, the United States has embraced these principles in its own administrative decisions, (See, e.g., *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692, 705 (1979).)

A similar approach is reflected in federal statutes and regulations concerning the legal status of floatplanes and similar craft. (See, e.g., 33 U.S.C. § 1601(1) (International Navigation Rules Act of 1977); 33 U.S.C. § 2003(a) (Inland Navigation Rules); 43 C.F.R. § 2650.0-5 (BLM regulations implementing Alaska Native Claims Settlement Act defining "major waterway" as one having significant use "by watercraft, including floatplanes . . ."); 36 C.F.R. § 328.5(a) (requiring that seaplanes while upon water operate in accordance with marine rules for power boats and other vessels); 35 C.F.R. § 111.31 (establishing rules of navigation for seaplanes and related craft on waters within Panama Canal).)

A ruling that floatplanes constitute relevant evidence of navigability for title purposes, therefore, is both mandated under applicable judicial precedents and consistent with analogous federal statutes, regulations and administrative determinations.

C. Important Public Policy Considerations Require That the Sovereign States Not Be Divested of the Beds of Their Vital Waterways Through an Excessively Narrow Interpretation of "Navigability"

The policy ramifications of the decision below are extensive. This nation's waterways represent important commercial arteries and resources, opportunities for recreational diversion in our increasingly hectic society and irreplaceable environmental treasures. (See, e.g., *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892); *Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 454, 456 (1851); Coastal Zone Management Act, 16 U.S.C. §§ 1451, 1453-1464; R. Dewsnep, *Public Access Rights in Waters*

and Shorelands (1971).) The holding below that evidence of floatplane use is inadequate as a matter of law to establish sovereign title portends serious restrictions on the use of lakes and rivers and will work a great wrong upon the public for whom these lands are held in trust. (E.g., *Illinois Central Railroad v. Illinois, supra; Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (9th Cir. 1884).)

Early in our nation's history, the courts perceived that mechanical and rigid views of navigability would have an untoward effect on the public interest. For example, American courts quickly rejected the so-called English common law rule limiting navigable waters to those in which the tide ebbed and flowed. They did so based on the ineluctible view that this country's countless inland navigable waters, encountered and utilized in conjunction with the nation's westward expansion, made that rule wholly unsuitable here. (See, e.g., *Shively v. Bowlby,* 152 U.S. 1, 31 et seq. (1893).)

Similar considerations exist in the present case. The importance of the public rights involved mandates a flexible and expansive interpretation of navigability. As one state court noted:

> "We must at this point examine the *ultimate* fact of navigability under the 'public purposes' test. That we may do so should be unquestioned." (*In re Martiny Lakes Project,* 381 Mich. 180, 212, 160 N.W. 2d 909, 925 (1968); emphasis in original.)

This Court recognized well over a century ago that sovereign lands represent a most fundamental incident of state sovereignty:

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of police power." (*Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845).)

For these reasons, the Court of Appeals' opinion in this case represents unsound policy as well as erroneous legal analysis.

CONCLUSION

For the foregoing reasons, amici join the State of Alaska in urging that the Court issue its writ of certiorari in this case.

DATED: July 26, 1985

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

N. GREGORY TAYLOR
Assistant Attorney General

RICHARD M. FRANK
Deputy Attorney General

CORINNE WATANABE
Acting Attorney General
State of Hawaii

JIM JONES
Attorney General
State of Idaho

HUBERT M. HUMPHREY, III
Attorney General
State of Minnesota

MICHAEL T. GREELY
Attorney General
State of Montana

BRIAN MCKAY
Attorney General

WILLIAM ISAEFF
Chief Deputy Attorney General
State of Nevada

NICHOLAS SPAETH
Attorney General
State of North Dakota

DAVID FROHNMAYER
Attorney General
State of Oregon

KENNETH D. EIKENBERRY
Attorney General
State of Washington

Counsel for Amici Curiae State of California ex rel. State Lands Commission and the States of Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota, Oregon and Washington

(5)

No. 85-78

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1985

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

HAROLD M. BROWN
ATTORNEY GENERAL

KENNETH C. POWERS*
ASSISTANT ATTORNEY GENERAL

State of Alaska
Office of the Attorney General
1031 West 4th Ave., Suite 200
Anchorage, Alaska 99501
(907) 276-3550

* *Counsel of Record* *Counsel for Petitioner*

aBCD Legal Printers, Seattle, Washington

BEST AVAILABLE COPY

12

TABLE OF CONTENTS

Page

Argument In Reply 1

A. The Decision Below Is Of Great Importance To A Fundamental Right Of State Sovereignty In All States 1

B. Neither Federal Statutes Nor The Alaska Constitution Are Relevant To The Issue Of Title Navigability 3

C. Respondents Rely Upon Inaccurate, Undocumented, and Irrelevant Facts To Support Their Self-Serving Policy Arguments 5

D. All Issues Presented By Alaska's Petition Are Worthy Of Review 7

Conclusion 9

TABLE OF AUTHORITIES

Cases *Page*

Appeal of Doyon, 86 I.D. 692 (ANCAB 1979) 5

Appeal of Walt Hanni, ANCAB VLS 80-13 4

Barney v. Keokuk, 94 U.S. 324 (1876) 6

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) . . 6

Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) 8

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) . . 6

Puget Sound Power & Light Co. v. FERC, 644 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981) 5

The Montello, 87 U.S.(20 Wall.) 430 (1874) 5

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 7

United States v. Holt State Bank, 270 U.S. 49 (1926) . . 2,4

United States v. Texas, 339 U.S. 707 (1950) 7

United States v. Utah, 283 U.S. 64 (1931) 2,4

Utah v. United States, 403 U.S. 9 (1971) 2

Statutes

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101(a) 3

Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 3
U.S.C. § 1613 (c) 4
U.S.C. § 1616 (b) 4

Other Authorities

Waite, *Pleasure Boating in a Federal Union*, 10 Buffalo L.Rev. 427 (1961) 7

No. 85-78

IN THE
Supreme Court of the United States

October Term, 1985

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN REPLY

A. The Decision Below Is Of Great Importance To A Fundamental Right Of State Sovereignty In All States.

Respondents'[1] characterization of the decision below as "carefully limited" to the isolated issue of floatplane takeoffs and landings on Slopbucket Lake (Fed. Opp. at 9 n.8; BBNC Opp. at 4) completely disregards the significant departure made in that decision from established constitutional doctrine.

---

[1] The federal respondents and respondent Bristol Bay Native Corporation (BBNC) each filed a brief in opposition to Alaska's petition in which essentially the same arguments were presented. The term "respondents" is used throughout this brief to refer to those collective arguments. Respondents' briefs are cited individually as "Fed. Opp." and "BBNC Opp."

and the nationwide effect on title navigability litigation that will result. Under well-established precedents of this Court, title navigability is a factual issue determined by the capability of the waterbody to be used for purposes of conducting transportation and commerce, regardless of the mode, manner, or extent of use. *United States v. Utah*, 283 U.S. 64, 76, 83 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). The Ninth Circuit decision replaces that broad factual inquiry with a technical, restrictive, and incorrect legal analysis. According to the Ninth Circuit, it is not sufficient for states to prove that a river or lake is navigable. They must prove that the waterbody is a "highway," used by "primarily waterborne" modes of commerce, and that the vessels operate "from point to point" on the body of water.

If not corrected by this Court, the erroneous legal analysis used by the Ninth Circuit will result, as it did in this case, in the failure of courts to consider facts demonstrating actual use of a waterbody for public transportation or commerce simply because the mode of use differs from those appearing in previous title navigability decisions. In Alaska, the decision will totally exclude consideration of floatplane activities from any title navigability case, even though floatplanes are a vital component of Alaska's transportation system.

Because the decision below reflects a fundamental shift in title navigability jurisprudence, its effects will not be limited to Alaska. Throughout the history of title navigability litigation, the federal government has opposed sovereign claims of title navigability by proposing restrictive legal interpretations of the terms used in the federal test. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971) (phrase "highway of commerce"). Until this case, those federal efforts have failed. The decision below — with its summary dismissal of Alaska's title navigability claim — is likely to encourage renewed federal attempts to restrict sovereign claims of title navigability, with adverse consequences for title navigability litigation throughout the United States.

Respondents' characterization of the decision below as limited to floatplane takeoffs and landings on Slopbucket Lake is also inaccurate. The district court's ruling, affirmed by the court of appeals, was that floatplane activities are *legally irrelevant* to title navigability determinations. Pet. App. C-8. It was on the basis of that broad exclusionary ruling that the court denied Alaska's summary judgment motion and dismissed the case with prejudice, not on the basis of a "carefully limited" finding that Slopbucket Lake is nonnavigable.

Respondents' attempt to belittle the significance of this case is also contradicted by their claim that the case has potentially momentous consequences for land ownership and land management in Alaska. Fed. Opp. at 9 n.7; BBNC Opp. at 6-7. In the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101(a), Congress specifically found that Alaska's lands and waters have "*nationally significant* natural, scenic, historic, cultural, recreational, and wildlife values" that deserve long-term protection. (Emphasis added). The effect of the decision below on future federal attempts to convey the beds of Alaska's waterbodies into private ownership is a matter of national concern and justifies this Court's review.

B. Neither Federal Statutes Nor The Alaska Constitution Are Relevant To The Issue Of Title Navigability.

Respondents' suggestion that Alaska's title navigability claim may be rejected on the basis of provisions in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 - 1628, and in the Alaska Constitution is without legal foundation. In addition, the premise underlying that suggestion — that these provisions provide an adequate alternative to title navigability findings — is both unproven and inaccurate. Respondents' irrelevant and unproven propositions should not influence the Courts' decision to review this case.

Respondents assert that the public easement and reconveyance provisions in ANCSA adequately protect public use of Alaska's lakes for transportation. Fed. Opp. at 9-10. Those provisions were enacted more than 13 years after Alaska's statehood, however, and are irrelevant to the issue of title navigability. *See United States v. Utah*, 283 U.S. at 88-89 (rejecting reliance upon post-statehood federal activities unrelated to the navigability of the waters). Furthermore, the ANCSA provisions apply only to the 44 million acres of federal land conveyed to Alaska Native corporations. Title navigability is a matter of public concern on all 375 million acres in Alaska, not just on lands conveyed under ANCSA.

Respondents' claim based upon ANCSA is also speculative and unfounded. Nothing in the record indicates that the public easement and reconveyance provisions of ANCSA accomplish the broad public protections that respondents are claiming.[2] Alaska's sovereign rights and responsibilities under the equal-footing doctrine of the United States Constitution cannot hinge upon the Secretary's administrative discretion in determining whether and where public easements should be reserved.

A similar analysis applies to respondents' suggestion that provisions in the Alaska Constitution negate the need for review of this case. Fed. Opp. at 9, n.9. Title navigability is strictly a matter of federal law. *United States v. Holt State Bank*, 270 U.S. at 55-56. Alaska's constitutional provisions are therefore irrelevant to the issues presented here.

---

[2] Respondents do not cite a single occasion in which the lands beneath waters used as a floatplane base have been reconveyed to a municipality or to the state under § 14(c) of ANCSA, 43 U.S.C. § 1613(c). *See* Fed. Opp. at 10, n.10. Although two one-acre site easements were eventually reserved on the shores of Slopbucket Lake under § 17 (b) of ANCSA, 43 U.S.C. § 1616 (b), that did not occur until an adversely affected public user filed an administrative appeal protesting the government's failure to do so initially. *Appeal of Walt Hanni*, ANCAB VLS 80-13. Moreover, the banks and shores of countless other rivers and lakes have been conveyed to Alaska Native corporations without these reservations.

Moreover, respondents do not cite a single case from an Alaska state court holding that the Alaska Constitution provides an equivalent degree of public protection for Alaska's waterbodies as does a finding of title navigability. There is simply no guarantee that public use of Alaska's important rivers and lakes will be protected if the submerged lands are privately owned.

C. Respondents Rely Upon Inaccurate, Undocumented, and Irrelevant Facts To Support Their Self-Serving Policy Arguments.

Respondents repeat the undocumented and inaccurate claim, erroneously relied upon by the district court, that Alaska has over three million small, isolated lakes accessible by floatplanes which will be affected by the outcome of this case. Fed. Opp. at 9, n.7; BBNC Opp. at 6-7. The claim has no factual support, in the record or otherwise. The number, size, and location of lakes in Alaska accessible by floatplanes was not the subject of a factual hearing in this case, and this issue is irrelevant to a determination of the navigability of Slopbucket Lake. Respondents' untried, unproven, and irrelevant claim should not influence this Court's consideration of Alaska's petition.

Respondents hypothesize that a finding of title navigability in this case will necessarily result in title navigability findings for all other lakes in Alaska upon which a floatplane theoretically could land. Fed. Opp. at 9, n.7; BBNC Opp. at 7. However, whether the mere capability of a waterbody to be used for takeoffs and landings by floatplanes is sufficient to establish title navigability is not presented by the facts of this case. Respondents' hypothesis is also an incorrect statement of the law and ignores Alaska's legal position in this and other cases. Prophesies that a finding of navigability in one case will result in never-ending streams of navigability findings have been flatly rejected both by this Court and other federal courts applying the federal test of navigability to new facts. *See, e.g., The Montello,* 87 U.S. (20 Wall.) 430 (1874); *Puget Sound Power & Light Co. v. FERC,* 644 F.2d 785, 789 (9th Cir.), *cert. denied,* 454 U.S. 1053 (1981); *Appeal of Doyon,* 86 I.D. 692, 708 (ANCAB 1979).

Respondents imply that a ruling in favor of the State of Alaska could adversely affect private use and development of submerged lands lying within Native conveyance areas. Fed. Opp. at 9, n.7; BBNC Opp. at 7. Once again, respondents' argument is irrelevant to the issue in this case and lacks a factual foundation. Their theoretical concern also runs directly counter to this Court's well-considered determination that private ownership of the beds of public waterways constitutes an unacceptable interference with the sovereign powers of state government. *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876). Respondents' position emphasizes the need for review and reversal of the decision below.

Respondents suggest that the real issue in this litigation is ownership of mineral resources in the subsurface estate of Alaska's lakes, not public use and access. Fed. Opp. at 8-10; BBNC Opp. at 7-8. Both issues are involved. Sovereign ownership of the beds of navigable waters carries with it control over the waters above them. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892). Accordingly, state ownership of whatever resources are or may someday be discovered in the beds of navigable waters in Alaska (the record is silent on the subject) ensures that development of those resources will be conducted consistent with the public rights in the waters above them. Under the equal footing doctrine of the United States Constitution, responsibility for balancing the competing public interests in use and development of Alaska's rivers and lakes is vested in the sovereign State of Alaska, subject only to the regulatory powers granted to the federal government. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Respondents' argument based upon state ownership of the resources in the beds of navigable waters in Alaska turns established constitutional doctrine on its head.

Respondents' claim that consideration of floatplane use in determining title navigability in Alaska would deny other states equal footing (Fed. Opp. at 7, n.5; BBNC Opp. at 8) is based upon a misunderstanding of the equal footing doctrine.

The equal footing doctrine is concerned with equal sovereign rights, not equal property rights. *United States v. Texas*, 339 U.S. 707, 716 (1950). The fact that the total number of acres of navigable waters may differ from state to state, based upon differences in geography and modes of transportation, has no bearing on the issue of equal sovereign rights under the equal footing doctrine. Obviously, the total acreage of navigable waters will differ substantially between a small coastal state like New Jersey, an arid western state like Arizona, and the dramatic expanses of Alaska. *See United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405-06 (1940).[3]

D. All Issues Presented By Alaska's Petition Are Worthy Of Review.

Respondents simply ignore the paramount issue of the legal relevancy of floatplane use. They do so by incorrectly focusing their arguments on the important but nevertheless subsidary question of the sufficiency of the evidence of floatplane operations on Slopbucket Lake for a finding of title navigability. The relevancy issue, disregarded by respondents, deserves this Court's attention.

The second issue raised in Alaska's petition also deserves attention. It addresses the lower court's failure to provide Alaska an opportunity to present its case at trial. Petitioners attempt to dismiss this important issue with the simplistic assertion that all of Alaska's allegations concerning floatplane use were accepted by the lower courts as true and that, since the use of floatplanes in Alaska and on Slopbucket Lake is not disputed, no factual issues remain to be litigated in this case. Fed. Opp. at 11, n.12; BBNC Opp. at 9. The decisions of this Court cited in Alaska's petition, however, address situations in which summary judgment is inappropriate *despite the lack of disputed issues of material fact.* Alaska Pet. at 13. Respondents have not addressed the true nature of Alaska's objection.

---

[3] Professor G. Graham Waite's article, *Pleasure Boating in a Federal Union*, 10 Buffalo L. Rev. 427, 433 (1961), contains an excellent analysis of the equal footing consequences of factual variations in title navigability decisions.

There are a substantial variety of settings and circumstances in which floatplanes are used in Alaska. Slopbucket Lake is just one example. Delivery of the U.S. mail, hunting and fishing expeditions, natural resource exploration and development, scientific research, commercial fishing, tourism, community services, search and rescue operations, fire fighting, mundane activities like grocery shopping and visiting relatives, and numerous other aspects of life throughout Alaska involve the regular operations of floatplanes on Alaska's rivers and lakes. Some of these activities were mentioned in the written material submitted to the district court. Many others were not. All of these activities, however, are directly and adversely affected by the lower court's decision. Regardless of whether the facts of this case are reasonably subject to dispute, it was reversible error for the district court to issue a decision of such magnitude without giving Alaska the opportunity to fully present those facts at trial. *See Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

Respondents cite Alaska's motion for summary judgment as evidence that Alaska agreed that this case involved no issues of material fact necessitating a trial. Fed. Opp. at 11. In Alaska's view, the facts submitted in support of summary judgment were clearly sufficient to support a finding that Slopbucket Lake is navigable. Alaska's exercise of its right to move for summary judgment on that issue, however, is not a substitute for its right to present witnesses on the far-ranging issues presented by the federal government's motion to ignore all evidence relating to floatplane use as legally irrelevant. A summary judgment motion is no substitute for a presentation of witnesses who completely understand and can fully explain the significant role that floatplanes have played in Alaska's past, how they are used in Alaska today, and their importance to Alaska's future.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, because the decision below is in direct conflict with prior decisions of this Court, petitioner respectfully suggests that summary reversal would be appropriate.

DATED this 22nd day of October, 1985.

Respectfully submitted,

HAROLD M. BROWN
ATTORNEY GENERAL

KENNETH C. POWERS
ASSISTANT ATTORNEY GENERAL

Counsel for Petitioner

Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS
CLERK

No. 85-78

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND THE STATES OF HAWAII, IDAHO, MINNESOTA, MONTANA, NEVADA, NORTH DAKOTA, OREGON AND WASHINGTON IN SUPPORT OF THE STATE OF ALASKA'S PETITION FOR CERTIORARI

JOHN K. VAN DE KAMP
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
RICHARD M. FRANK*
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
1515 K STREET, SUITE 511
SACRAMENTO, CA 95814
(916) 324-5497

(Continued on inside front cover)

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

16 pp

CORRINE WATANABE
Acting Attorney General
State of Hawaii
State Capitol
Honolulu, HI 96813

JIM JONES
Attorney General
State of Idaho
Statehouse
Boise, ID 83720

HUBERT M. HUMPHREY, III
Attorney General
State of Minnesota
102 State Capitol
St. Paul, MN 55155

MICHAEL T. GREELY
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620

BRIAN MCKAY
Attorney General
WILLIAM ISAEFF
Chief Deputy Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

NICHOLAS SPAETH
Attorney General
State of North Dakota
State Capitol
Bismark, ND 58505

DAVID FROHNMAYER
Attorney General
State of Oregon
Justice Building
Salem, OR 97310

KENNETH D. EIKENBERRY
Attorney General
State of Washington
Temple of Justice
Olympia, WA 89504

Counsel for Amici Curiae State of California ex rel. State Lands Commission and the States of Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota, Oregon and Washington

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether evidence of extensive and longstanding use of a waterway by floatplanes—one of the primary means of commerce utilized on Alaska's extensive system of inland waterways since the time of statehood—for a variety of trade and commercial activities is relevant in determining that state's sovereign title to the waterway's bed.

TABLE OF CONTENTS

Page

Question Presented i

I

Interest of Amici 2

II

Statement of Case 3

III

Decisions Below 4

IV

Reasons for Granting the Writ 4

A. Longstanding Federal precedent establishes that navigability for title purposes is a broad and flexible concept 4

B. Floatplanes constitute proper evidence of navigability under judicial precedents, administrative decisions issued by appellees themselves, and Federal statutes and regulations 6

C. Important public policy considerations require that the sovereign states not be divested of the beds of their vital waterways through an excessively narrow interpretation of "navigability" 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

	Page
Appeal of Doyon, Ltd., 86 Interior Dec. 692 (1979)	8
Genesee Chief v. Fitzhugh 53 U.S. (12 How.) 443 (1851)	8
Illinois Central Railroad v. Illinois 146 U.S. 387 (1892)	8, 9
In re Martiny Lakes Project 381 Mich. 180, 160 N.W. 2d 909 (1968)	9
Loving v. Alexander 745 F.2d 861 (4th Cir. 1984)	6
Martin v. Waddell 41 U.S. 367 (1842)	2
Montana v. United States 450 U.S. 544 (1981)	2, 3
People v. Gold Run Ditch & Mining Co. 66 Cal. 138 (1884)	3
People of the State of California ex rel. Younger v. Tahoe Regional Planning Agency 516 F.2d 215 (9th Cir. 1975)	3
Pollard's Lessee v. Hagan 44 U.S. (3 How.) 212 (1845)	9
Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission 644 F.2d 785 (9th Cir. 1981)	6
Shively v. Bowlby 152 U.S. 1 (1893)	9
St. Anthony Falls Water Power Co. v. St. Paul Comm. 168 U.S. 349 (1897)	5
State of California v. Superior Court (Fogerty) 29 Cal.3d 240 (1981)	3
State of California v. Superior Court (Lyon) 29 Cal.3d 210 (1981)	2, 3
State of California ex rel. State Lands Commission v. Yuba Goldfields, Inc. 752 F.2d 393 (9th Cir. 1985)	3
State of Oregon v. Riverfront Protective Ass'n. 672 F.2d 792 (9th Cir. 1982)	6
The Daniel Ball 77 U.S. (10 Wall.) 557 (1870)	4, 5
The Montello 87 U.S. (20 Wall.) 430 (1874)	6, 8

TABLE OF AUTHORITIES

CASES

	Page
United States v. Appalachian Power Co., 311 U.S. 377 (1940)	5, 7
United States v. Holt State Bank 270 U.S. 49 (1926)	5
United States v. Utah 283 U.S. 64 (1931)	7
Utah v. United States 403 U.S. 9 (1971)	8
Wisconsin v. Federal Power Comm. 214 F.2d 334 (7th Cir. 1954)	6
Woodruff v. North Bloomfield Gravel Mining Co. 18 F. 753 (9th Cir. 1884)	9

Statutes, Codes and Other Authorities

1 Stat. 50	3
1 Stat. 52	3
9 Stat. 452	3
35 C.F.R., § 111.31	8
36 C.F.R., § 328.5(a)	8
43 C.F.R., § 2650.0-5	8
33 U.S.C. § 1601(1)	8
33 U.S.C. § 2003(a)-8	8
16 U.S.C. § 1451	8
16 U.S.C. § 1453-1464	8
Supreme Court Rule 36.1	1
Supreme Court Rule 36.4	1
R. Dewsnep, Public Access Rights in Waters and Shorelands (1971)	8, 9
State Lands Division, Summary for State-owned Tide and Submerged Lands, Shoreline Mileages (May 1972)	2

No. 85-78

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND THE STATES OF HAWAII, IDAHO, MINNESOTA, MONTANA, NEVADA, NORTH DAKOTA, OREGON AND WASHINGTON IN SUPPORT OF THE STATE OF ALASKA'S PETITION FOR CERTIORARI

Amici curiae States of California ex rel. State Lands Commission and the States of Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota, Oregon and Washington respectfully file this amici curiae brief in support of the State of Alaska's petition for certiorari in this case. Pursuant to Supreme Court Rule 36.4, consent of the parties to the filing of this brief is not required. This amici curiae brief is timely filed under the provisions of Supreme Court Rule 36.1.

I

INTEREST OF AMICI

Amici's extensive systems of lakes and rivers constitute a vital public resource. The states acquired the beds of their navigable waterways as an incident of sovereignty upon admission to the Union, and hold these lands in trust for the benefit of their citizens. (*Montana v. United States*, 450 U.S. 544, 551-552 (1981); *Martin v. Waddell*, 41 U.S. 367, 410 (1842); *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 172 Cal.Rptr. 696 (1981) cert. den., 454 U.S. 865 (1981).) These inland waterways have played a crucial role in the historical development of the American West. They continue to furnish the public with substantial commercial, navigational, recreational and ecological benefits. (See, e.g., *State of California v. Superior Court (Lyon), supra; State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 172 Cal.Rptr. 713 (1981), cert. den. 454 U.S. 865 (1981).)

The importance of these waterways is matched by their extensive nature. A recent survey in California, for example, reveals that there are approximately 807 miles of shoreline around navigable lakes and 3,046 miles of shoreline along that state's nontidal navigable rivers. (State Lands Division, *Summary for State-owned Tide and Submerged Lands, Shoreline Mileages,* (May 1972).)

Particularly in recent years, substantial attention has focused on the ownership of the beds of particular inland waterways. This is due in large part to general population increases, migration to previously-undeveloped areas, increased demand for public recreational facilities and the developmental pressures engendered by these other factors. The states, riparian owners and the general public have increasingly turned to the courts to determine their respective rights and obligations concerning Western waterways. A substantial amount of litigation has resulted in both federal and state courts with the principal issue often being who owns the bed

of the waterway in question. This, in turn, leads inevitably to the particular lake or river's navigable status.[1]

Historically, this Court has employed a realistic and practical test of navigability, one in keeping with the realities of the times and consistent with state sovereignty. The decision of the Ninth Circuit Court of Appeals, to the extent it signals a departure from that tradition, will prejudice amici's efforts to perfect their own sovereign ownership claims. Based as it is upon a fundamental misperception of applicable law, the ruling could abrogate amici's sovereign interest in these vital resources.

The importance of sovereign rights attaching to these lands has been recognized repeatedly by Congress. In adopting California's Act of Admission, for example, it declared the State's navigable waterways to be "common highways, and forever free . . . ." (9 Stat. 452; see also Northwest Ordinance of 1787, 1 Stat. 50, 52.) Moreover, their value has consistently been reflected in federal and state case law. (See, e.g., *Montana v. United States, supra,* 450 U.S., 544, 551; *People of the State of California* ex rel. *Younger v. Tahoe Regional Planning Agency,* 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868 (1975); *State of California v. Superior Court (Lyon), supra,* 29 Cal.3d 210, 172 Cal.Rptr. 696; *People v. Gold Run Ditch & Mining Co.,* 66 Cal. 138 (1884).)

II

STATEMENT OF CASE

Amici adopt the statement of the case set forth in the State of Alaska's petition for certiorari.

---

[1] In California, for example, see *State of California* ex rel. *State Lands Commission v. Yuba Goldfields, Inc.,* 752 F.2d 393 (9th Cir. 1985), pet. for certiorari pending (Yuba River); *Brandenberger et al. v. State of California,* pending in Nevada County Superior Court No. 21947 (Donner Lake).

activities in which the commerce at issue is conducted primarily on the water itself" (*ibid.*). Floatplanes, providing airborne transportation, "are not a mode of conducting commerce on water for the purpose of the test" (*ibid.*). The court expressly rejected petitioner's argument that floatplanes travel on "a continuous joint air-water highway" (*ibid.*), concluding that floatplane activities "are legally irrelevant in making navigability determinations" (*id.* at C8).

The district court denied petitioner's request for interlocutory appeal certification (Pet. App. A3), see 28 U.S.C. 1292(b). Petitioner then waived "any claim to the 'navigability of Slopbucket Lake independent of the activities of floatplanes' " (Pet. App. A3) and the court entered final judgment in favor of all defendants (*id.* at D-1). Petitioner appealed and the court of appeals affirmed under much the same reasoning employed by the district court.

Like the district court, the court of appeals placed central reliance on *The Daniel Ball* (Pet. App. A4-A5), agreeing that "use of Slopbucket Lake by floatplanes * * * is insufficient as a matter of law to render the lake navigable for purposes of title" (*id.* at A8).[3] The court specifically considered and rejected petitioner's contention that, because floatplanes "are a mode of commerce that operates partially on water," floatplane use established navigability as a matter of law (*id.* at A5). The court also considered *The Montello,* 87 U.S. (20 Wall.) 430, 441-442 (1874), where this Court stated that a river is "navigable in fact * * * [i]f it [is]

---

[3]The court's original opinion referred to "use of Slopbucket Lake by floatplanes and related incidental watercraft" (Pet. App. A8). On May 3, 1985, the court granted petitioner's motion to amend the opinion by deleting the words "and related incidental watercraft." See *id.* at B1. The amendment is misprinted in the reported decision, which states that "use of Slopbucket Lake by floatplanes and [sic] is insufficient as a matter of law to render the lake navigable for purposes of title." 754 F.2d at 855.

capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted * * *." The court of appeals noted that *The Montello* refused to limit navigability to waterways open only to steam or sail vessels, permitting a determination of navigability based on the use of shallow draft Durham boats propelled by animal power (Pet. App. A5). The court of appeals nevertheless observed (*ibid.*) that:

> the crux of the test is still the requirement that the body of water be susceptible of use as a highway or channel for commerce on water. *Utah* v. *United States,* 403 U.S. at 11. This necessarily involves the utilization of the waterway as a path between two points.

Stating that "the central theme remains the movement of people or goods from point to point on the water" (Pet. App. A6), the court of appeals rejected petitioner's assertion that, because Slopbucket Lake is an integral part of an "air and water highway" over which floatplanes travel, it should be deemed navigable for purposes of determining title. Instead, the court characterized the lake as "a terminus or launching point for floatplanes, not 'a *channel* for useful commerce' " (Pet. App. A6; quoting *United States* v. *Holt State Bank,* 270 U.S. 49, 56 (1926) (emphasis supplied by the court)). In short, floatplanes were held insufficient as a matter of law to render Slopbucket Lake navigable for purposes of title because "floatplanes go to and from the lake; they do not travel on the water" (*ibid.*).

ARGUMENT

The decision of the court of appeals is plainly correct. It does not conflict with any decision of this Court or any other court of appeals. Nor will such a conflict arise in the future since the Ninth Circuit exercises appellate jurisdiction over federal cases from Alaska and Hawaii, the only

states in which the issue can arise.[4] Accordingly, there is no warrant for this Court's review.

1. Petitioner contends (Pet. 8-10) that the court of appeals' holding miscontrues the federal test for navigability and is inconsistent with prior decisions of this Court. Petitioner is plainly mistaken. The court of appeals' decision is based squarely on *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870), which provides:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Lakes that simply provide an arrival and departure point for airborne traffic are not "highways" for "the customary modes of trade and travel on water." Such lakes serve as runways rather than highways, supporting traffic through the air rather than on water. Petitioner's contentions to the contrary toss familiar and well established principles of navigability to the wind.

The court of appeals correctly observed that the characterization of a waterway as a highway "necessarily involves the utilization of the waterway as a path between two points" (Pet. App. A5). Indeed, a finding of navigability is invariably based upon trade or travel conducted between two points upon the waters' surface. See, *e.g., Utah* v.

---

[4]Navigability, for purposes of ascertaining whether a state has title to submerged lands, is determined as of the date of statehood. *Utah* v. *United States,* 403 U.S. 9, 9-10 (1971). As petitioner recognizes (Pet. 12), Hawaii is the only other state admitted to the Union since the commercial development of floatplanes.

United States, 403 U.S. 9, 11 (1971) (transportation of livestock between the shores and islands of the Great Salt Lake); *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 411 (1940) (transportation of various products between points on the New River); *United States* v. *Holt State Bank,* 270 U.S. 49, 57 (1926) (transportation of goods between points on Mud Lake); *State of Oregon* v. *Riverfront Protection Ass'n,* 672 F.2d 792, 795 (9th Cir. 1982) (transportation of logs down the McKenzie River).[5] The court of appeals properly recognized that surface transportation on the waterway represents "the gist of the federal test." *Utah,* 403 U.S. at 11.

Petitioner contends (Pet. 9) that floatplane use satisfies the navigability test because floatplanes are used for commercial purposes. Petitioner's sole support for this proposition is *The Montello,* 87 U.S. (20 Wall.) 430, 442 (1874), which recognizes that traffic by vessels "of any kind that can float upon the water" may provide evidence of navigability. That dictum, read in context, does not support petitioner's position that floatplane use conclusively establishes navigability. Indeed, that statement plainly referred only to

---

[5]Notably, the requirement that trade or travel be conducted across or along a water body has heretofore prompted courts to find small, isolated lakes such as Slopbucket Lake to be non-navigable. See, *e.g., State* v. *Bollenbach,* 241 Minn. 103, 120, 63 N.W.2d 278, 289 (1954); *Monroe* v. *State,* 111 Utah 1, 6, 175 P.2d 759, 762 (1946); *Proctor* v. *Sim,* 134 Wash. 606, 611, 236 P. 114, 116 (1925). In the only prior case directly addressing the relevance of floatplanes in determining navigability for title, the court rejected the argument that floatplane use could render a small lake navigable. *Snively* v. *State,* 167 Wash. 385, 389, 9 P.2d 773, 774-775 (1932). A conclusion that floatplane use renders a lake navigable would result in a marked departure from presently uniform law. Moreover, it would vest Alaska, alone among the states, with title to the beds of small, isolated lakes. That result would contravene the Equal Footing Doctrine's express purpose of assuring equal treatment among the original and newly admitted states. See *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212, 223, 228-229 (1845).

traffic by waterborne vessels. See 87 U.S. (20 Wall.) at 442; see also *id.* at 443 ("the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce").[6]

The court of appeals' decision expressly recognizes what is implicit in *The Montello* and numerous other cases governing navigability determinations—that the federal navigability test is based upon waterborne transportation from point to point upon the waters' surface. See, *e.g.*, *United States* v. *Oregon*, 295 U.S. 1, 21-24 (1935); *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 86 (1922). The decision does not constitute a "departure from the well-established precedents of this Court" (Pet. 10); rather, it represents the correct application of familiar principles of federal law. Neither this Court nor the courts of appeals have ever suggested that the federal test for navigability is satisfied, as a matter of law, by the fleeting and tangential contacts of floatplanes that light upon the waters' surface.

2. Petitioner further argues (Pet. 10-13) that this Court should review the court of appeals' decision because it has potentially momentous consequences for Alaska. It is certainly true that petitioner might profit handsomely from its suggested change in the established test for determining title

---

[6]As the district court emphasized (Pet. App. C7) and petitioner does not dispute, "[a]ll the previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted primarily on the water itself." The lower courts' emphasis on the waterborne characteristics of commercial traffic is consistent with *The Daniel Ball's* reference to "customary modes of trade and travel *on water*." *The Daniel Ball*, 77 U.S. (10 Wall.) at 563 (emphasis added). Indeed, just as incidental use of a water body by a floatplane for takeoffs and landings fails to satisfy the "highway for commerce" prerequisite, the fact that floatplanes are primarily airborne establishes that they are not a customary mode of trade and travel on water.

to submerged lands.[7] But grand expectations do not add merit to far-fetched arguments. The fact that petitioner would stand to gain ownership of thousands, and perhaps millions, of acres of lakebed property does not support review of what are, at bottom, insubstantial claims.[8]

Petitioner's assertion (Pet. 11) that the court of appeals' decision will affect public use of Alaskan waterways for transportation and commerce is, at best, doubtful. The decision addresses the federal standard, expressed in *The Daniel Ball,* for determining ownership of submerged lands. It does not impair petitioner's sovereign power to regulate, within constitutional limits, the use of water resources within its borders. See *Sporhase* v. *Nebraska,* 458 U.S. 941, 954 (1982).[9] Furthermore, the transfer of

---

[7]The district court noted (Pet. App. C6 n.5) "[t]here are over three million lakes in Alaska and a great number of them are accessible by floatplane." Lakes located throughout Alaska, including lakes in the midst of native landholdings and federal parks and refuges, could be deemed navigable under petitioner's position solely by virtue of susceptibility to floatplane use. By radically expanding the definition of navigability for title purposes, petitioner would stand to gain considerable benefits from the control over and use of mineral resources in those lake beds. For example, the oil-rich North Slope of Alaska embraces countless small, isolated lakes.

[8]Petitioner also asserts (Pet. 12) that the effect of the court of appeals' decision may not be limited to Alaska (and, presumably, Hawaii) in light of the court's requirement that the transportation in question be conducted from point to point on the body of water. Petitioner argues that the decision could affect navigability decisions "where rivers and lakes often serve as only one portion of the route of travel" (*ibid.*). This contention is meritless. The court of appeals carefully limited its decision to a conclusion "that use of Slopbucket Lake by floatplanes is insufficient as a matter of law to render the lake navigable for purposes of title" (Pet. App. B1).

[9]The Alaska Constitution states that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. Art. VIII, § 3. See also Alaska Stat. § 46.15.030 (1982). In light of these constitutional and statutory provisions,

submerged lands to native corporations under the ANCSA will not defeat public use of lakes for transportation. The ANSCA contains specific reconveyance and public easement provisions to assure that the public can travel throughout Alaska despite the transfer of federal land holdings to native corporations.[10] Indeed, the BLM designated Slopbucket Lake a "major waterway" under the public easement provisions. Accordingly, two one-acre sites have been reserved along the shores of Slopbucket Lake and adjoining Iliamna Lake to provide protected areas for floatplanes.[11]

---

the district court in *Alaska Public Easement Defense Fund* v. *Andrus*, 435 F. Supp. 664, 677 (D. Alaska 1977), held that "the people of the State have the right to use the water itself on non-navigable rivers and streams." See *Wernberg* v. *State*, 516 P.2d 1191, 1198-1199 (Alas. 1973) ("the provisions in article VIII [of the Alaska Constitution] were intended to permit the broadest possible access to and use of state waters by the general public"); see also MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 Fla. St. U. L. Rev. 511, 605 (1975).

[10]Under the ANCSA's reconveyance provisions, 43 U.S.C. 1613(c), native village corporations must reconvey selected lands that fall under designated categories, including "the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways * * *." 43 U.S.C. 1613(c)(4). See also 43 U.S.C. 1613(c)(3). The public easement provisions provide for the reservation of public easements across lands conveyed to native corporations at periodic points along "major waterways." See 43 U.S.C. (1976 ed.) 1616(b); 43 C.F.R. 2650.4-1. See also 43 U.S.C. 1616 note.

[11]Petitioner argues (Pet. 4) that BLM's classification of Slopbucket Lake as a "major waterway," which is defined in 43 C.F.R. 2650.0-5(o) to include any lake which has significant use in its liquid state by boats or floatplanes for access to publicly owned lands or between communities, conflicts with its administrative determination that the lake is non-navigable. However, that argument is plainly meritless. The contention that the term "major waterways" in 43 U.S.C. (1976 ed.)

3. Finally, petitioner asserts (Pet. 13-14) that the entry of summary judgment was in error since navigability is a question of fact. However, the question before the court—whether floatplane use is sufficient as a matter of law to render Slopbucket Lake navigable—raised no unresolved issues of fact. Indeed, it was petitioner that elected to move for summary judgment relying *solely* on floatplane use to establish navigability. The federal defendants' motion for partial summary judgment accepted, arguendo, petitioner's allegations regarding the use of Slopbucket Lake by floatplanes, but maintained that floatplane use, standing alone, was insufficient as a matter of law to prove title. The district court agreed, ruling that "floatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title" (Pet. App. C8). Petitioner then expressly "waived any claim to the 'navigability of Slopbucket Lake independent of the activities of floatplanes' " (Pet. App. A3). Petitioner's waiver resolved any remaining factual issues concerning the navigability of Slopbucket Lake and the district court accordingly entered judgment against petitioner (*ibid.*). Thus, the court of appeals could properly rule that "use of Slopbucket Lake by floatplanes * * * is insufficient as a matter of law to render the lake navigable for purposes of title" (Pet. App. A8).[12]

1616(b)(1) should be deemed the equivalent of "navigable waterways" was properly rejected in *Alaska Public Easement Defense Fund* v. *Andrus*, 435 F. Supp. 664, 678 (D. Alaska 1977).

[12]Petitioner's assertion (Pet. 13) that it was never provided an opportunity to present evidence on all the facts regarding floatplane use is disproved by its own admission (Pet. 14) that its motion for summary judgment was accompanied by "a wealth of undisputed information regarding the use of floatplanes on Slopbucket Lake and on the use and importance of floatplanes in Alaska." The district court and court of appeals accepted this information as true for purposes of ruling on the legal relevance of floatplanes in title navigability determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
BLAKE A. WATSON
Attorneys

OCTOBER 1985

DOJ-1985-10